Supreme Court, U.S.
FILED
DEC 27 1985
JOSEPH F. SPANIOL, JR.
CLERK

85-1107

No.

In the Supreme Court of the United States

October Term, 1985

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 18, *et al.*,
Petitioners,

vs.

WILLIAM F. MURPHY,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

WILLIAM FADEL, *Counsel of Record*
FRANCES M. GOTE', *On Brief*
WULIGER, FADEL & BEYER
1340 Sumner Court
The Brownell Building
Cleveland, Ohio 44115
(216) 781-7777
Counsel for Petitioners

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

QUESTIONS PRESENTED

1. Whether the Sixth Circuit incorrectly affirmed the district court decision to award attorney fees without considering any factors in calculating the fees beyond the hours submitted and reasonable rate, in direct conflict with decisions in every other circuit and with prior decisions of this Court, as interpreted by a majority of the circuits?

2. Whether the Sixth Circuit's attorney fees decision, relying on statutory fee cases, disregarded the essential differences between fees based on the common benefit rationale and statutory fee awards, and thus conflicts with this Court's prior common benefit opinions?

3. Whether the Sixth Circuit erroneously affirmed the district court's abuse of discretion in direct conflict with cases in every other circuit and with prior decisions of this Court by awarding over $133,000 in attorney fees under the common benefit rationale, although by contract the plaintiff owed no fees to his private attorney or to his Legal Aid attorney, resulting in the plaintiff incurring no costs of the litigation to be spread proportionately amongst the membership of the class allegedly benefitting from the litigation?

LIST OF PARTIES TO PROCEEDINGS BELOW

WILLIAM F. MURPHY: *Plaintiff-Appellee/Cross-Appellant*

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 18, JOHN POSSEHL, CHARLES RUTHERFORD, JOHN FRANK, FRANK MILLER, and S. A. BLAIR: *Defendants-Appellants/Cross-Appellees*

TABLE OF CONTENTS

QUESTIONS PRESENTED I
LIST OF PARTIES TO PROCEEDINGS BELOW II
TABLE OF AUTHORITIES V
OPINIONS BELOW 1
JURISDICTION 1
STATUTES INVOLVED 1
STATEMENT OF THE CASE 2

A. July 18, 1978 Decision Of The District Court 3
B. October 14, 1982 Post-Judgment Memorandum Opinion And Order 5
C. Appeal And Cross-Appeal To The Sixth Circuit 6

REASONS FOR GRANTING THE WRIT 7

I. INTRODUCTION 7
II. THE SIXTH CIRCUIT INCORRECTLY AFFIRMED THE DISTRICT COURT DECISION TO AWARD ATTORNEY FEES WITHOUT CONSIDERING ANY FACTORS IN CALCULATING THE FEES BEYOND THE HOURS SUBMITTED AND REASONABLE RATE, IN DIRECT CONFLICT WITH DECISIONS IN EVERY OTHER CIRCUIT AND WITH PRIOR DECISIONS OF THIS COURT, AS INTERPRETED BY A MAJORITY OF THE CIRCUITS 9

A. The Sixth Circuit Incorrectly Relied On *Northcross*, An Opinion Unprecedented Among The Circuits And Directly Conflicting With The Positions Of Every Other Circuit 11

B. The Sixth Circuit's Attorney Fees Holding Conflicts With Prior Decisions Of The Supreme Court, As Interpreted By A Majority Of The Circuits 18

III. THE SIXTH CIRCUIT'S ATTORNEY FEES DECISIONS, RELYING ON STATUTORY FEE CASES, DISREGARDED THE ESSENTIAL DIFFERENCES BETWEEN FEES BASED ON THE COMMON BENEFIT RATIONALE AND STATUTORY FEE AWARDS, AND THUS CONFLICTS WITH THIS COURT'S PRIOR COMMON BENEFIT OPINIONS 20

IV. THE SIXTH CIRCUIT ERRONEOUSLY AFFIRMED THE DISTRICT COURT'S ABUSE OF DISCRETION IN DIRECT CONFLICT WITH CASES IN EVERY OTHER CIRCUIT AND WITH PRIOR DECISIONS OF THIS COURT BY AWARDING OVER $133,000 IN ATTORNEY FEES UNDER THE COMMON BENEFIT RATIONALE, ALTHOUGH BY CONTRACT THE PLAINTIFF OWED NO FEES TO HIS PRIVATE ATTORNEY OR TO HIS LEGAL AID ATTORNEY RESULTING IN THE PLAINTIFF INCURRING NO COSTS OF THE LITIGATION TO BE SPREAD PROPORTIONATELY AMONGST THE MEMBERSHIP OF THE CLASS ALLEGEDLY BENEFITTING FROM THE LITIGATION 26

CONCLUSION 30

APPENDIX (Under separate cover)—

Opinion, Findings of Fact and Conclusions of Law of the United States District Court (July 18, 1978) A-1

Post-Judgment Memorandum Opinion and Order of the United States District Court (October 14, 1982) A-377

Opinion of the United States Court of Appeals for the Sixth Circuit A-466

Supplemental Brief of Plaintiff-Appellee/Cross-Appellant, p. 14 ..... A-507

Supplemental Affidavit in Support of Plaintiff's Request For Counsel Fees A-509

Reply to Defendants' Brief in Opposition to Plaintiff's Motion For Counsel Fees, p. 11 ..... A-517

Statutes Involved:

29 U.S.C. § 411(a)(1), (2) and (5) A-504

29 U.S.C. § 412 ..... A-505

42 U.S.C. § 1988 ..... A-505

TABLE OF AUTHORITIES

Cases

Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975) 9, 21, 24, 25, 29

Bagby v. Beal 606 F.2d 411 (3d Cir. 1979) 15

Barber v. Kimbrell's, Inc., 577 F.2d 216 (4th Cir. 1978) 12

Blum v. Stenson, ... U.S. ....., 79 L. Ed. 2d 891, 104 S. Ct. (1984) 8, 23, 24

Bonner v. Coughlin, 657 F.2d 931 (7th Cir. 1981) 13

Brady v. Hartford Fire Ins. Co., 610 F. Supp. 735 (D.C. Md. 1985) 12, 19

Brewer v. Southern Union Co., 607 F. Supp. 1511 (D.C. Colo. 1984) 14, 19

Brewster v. Pike, 608 F. Supp. 1163 (D.C. Va. 1985) 12

City of Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir. 1974) 15
City of Detroit v. Grinnell Corp., 560 F.2d 1093 (2d Cir. 1977) 15
City of McKeesport v. Cunningham, 753 F.2d 262 (3d Cir. 1985), *petition for cert. filed*, No. 84-1793 .....7-8, 18
City of Riverside v. Rivera, 763 F.2d 1580 (9th Cir. 1985), *cert. granted*, No. 85-224 .....7, 9, 18
Copeland v. Marshall, 641 F.2d 880 (D.C. Cir. 1980) (*en banc*) 14, 15, 29
Copper Liquor, Inc. v. Adolph Coors Co., 624 F.2d 575 (5th Cir. 1980) 12, 13
Cornist v. Richland Parish School Board, 495 F.2d 189 (5th Cir. 1974), *modified*, 517 F.2d 1032 (5th Cir. 1975) 25
Curry v. Block, 608 F. Supp. 1407 (D.C. Ga. 1985) 14, 19
Davis v. West Community Hosp., 755 F.2d 455 (5th Cir. 1985) 13, 20
Easley v. Anheuser-Busch, Inc., 758 F.2d 251 (8th Cir. 1985) 13, 19
Furtado v. Bishop, 635 F.2d 915 (1st Cir. 1980) 14, 15
Grendel's Den, Inc. v. Larkin, 749 F.2d 945 (1st Cir. 1984) 14, 16-17, 19
Hall v. Cole, 412 U.S. 1 (1973) 9, 21, 22, 25, 28
Hart v. Bourque, 608 F. Supp. 1091 (D.C. Mass. 1985) 15, 19
Hensley v. Eckerhart, 461 U.S. 424 (1983) .....*passim*
Hoitt v. Vitek, 495 F.2d 219 (1st Cir. 1974) 25
Hummel v. Brennan, 83 F.R.D. 141 (E.D. Pa. 1979) 15
In re Mid-Atlantic Toyota Anti-trust Litigation, 605 F. Supp. 440 (D. Md. 1984) 12
Incarcerated Men of Allen County Jail v. Fair, 507 F.2d 281 (6th Cir. 1974) 28, 29

Inmates of Allegheny County Jail v. Pierce, 716 F.2d 177 (3d Cir. 1983) 15, 20
Institutionalized Juveniles v. Sec. of Pub. Wel., 758 F. 2d 897 (3d Cir. 1985) 15, 19, 20
IUOE, Local 18 v. NLRB, 496 F.2d 1308 (6th Cir. 1974) 4
IUOE, Local 18 v. NLRB, 555 F.2d 552 (6th Cir. 1977) 4
Jacquette v. Black Hawk County, Iowa, 710 F.2d 455 (8th Cir. 1983) 13
Johnson v. Georgia Highway Express, 488 F.2d 714 (5th Cir. 1974) ..... *passim*
Jones v. Central Soya Co., Inc., 748 F.2d 586 (11th Cir. 1984) 14, 19
Jones v. MacMillan Bloedel Containers, Inc., 685 F.2d 236 (8th Cir. 1982) 13
Knight v. Auciello, 453 F.2d 852 (1st Cir. 1972) 25
Ladies Ctr., Nebraska, Inc. v. Thone, 645 F.2d 645 (8th Cir. 1981) 13
Laffey v. Northwest Airlines, Inc., 746 F.2d 4 (D.C. Cir. 1984) 15, 19
Lindy Brothers Builders, Inc. of Philadelphia v. American Radiator & Standard Sanitary Corp., 487 F.2d 161 (3d Cir. 1973) 12
Lindy Brothers Builders, Inc. of Philadelphia v. American Radiator & Standard Sanitary Corp., 540 F.2d 102 (3d Cir. 1976) 12
Louisville Black Police Officers v. City of Louisville, 700 F.2d 268 (6th Cir. 1983) 16
Love v. Mayor of Cheyenne, 620 F.2d 235 (10th Cir. 1980) 29
Lynch v. City of Milwaukee, 747 F.2d 423 (7th Cir. 1984) 13, 19
Mandhare v. LaFargue Elementary School, 605 F. Supp. 238 (E.D. La. 1985) 13

Marion v. Barrier, 694 F.2d 2[illegible] (1[illegible]th Cir. 1982) 14
McCann v. Coughlin, 698 F.2d 1[illegible] (2d Cir. 1983) 12
Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970) 9, 21, 25, 28
Moore v. Jas. H. Matthews & Co., 682 F.2d 830 (9th Cir. 1982) 13
Murphy v. International Union of Operating Engineers, Local 18, et al., 99 L.R.R.M. 2074 (N.D. Ohio 1978) 5, 23
National Ass'n of Concerned Veterans v. Secretary of Defense, 675 F.2d 1319 (D.C. Cir. 1982) 17
New York Ass'n For Retarded Children v. Carey, 711 F.2d 1136 (2d Cir. 1983) 17
Northcross v. Board of Education of [illegible]mphis City Schools, 611 F.2d 624 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980) 8, 15, 16, 18, 19, 24
Ohio-Sealy Mattress Manuf. Co., et al. v. Sealy, Inc., et al., Case Nos. 84-2886 and 84-2926 (7th Cir. Oct. 21, 1985) 19
Palmigiano v. Garrahy, 616 F.2d 598 (1st Cir.), *cert. denied*, 449 U.S. 839 (1980) 29
Ramos v. Lamm, 713 F.2d 546 (10th Cir. 1983) 13, 17, 19, 29
Reynolds v. Coomey, 567 F.2d 1166 (1st Cir. 1978) 29
Segal v. Gilbert Color Systems, Inc., 746 F.2d 78 (1st Cir. 1984) 14, 19
Shimman v. International Union of Operating Engineers, Local 18, 744 F.2d 1226 (6th Cir. 1984) (*en banc*), *cert. denied*, 105 S. Ct. 1191 (1985) 6, 21, 23, 25
Souza v. Southworth, 564 F.2d 609 (1st Cir. 1977) 14
State of Ill. v. Sangamo Const. Co., 657 F.2d 855 (7th Cir. 1981) 13
Stewart v. Lubbock County, Tex., 767 F.2d 153 (5th Cir. 1985) 13, 19

Stewart v. Rhodes, 656 F.2d 1216 (6th Cir. 1981), *cert. denied*, 455 U.S. 991 (1982) 16

Summit Valley Industries v. Local 112, United Brotherhood of Carpenters, 456 U.S. 717 (1982) 21

Torres v. Sachs, 538 F.2d 10 (2d Cir. 1978) 29

Tusa v. Omaha Auto Auction, Inc., 712 F.2d 1248 (8th Cir. 1983) 19, 20

Varner v. Century Finance Co., Inc., 738 F.2d 1143 (11th Cir. 1984) 14

Waters v. Wisconsin Steel Works, 502 F.2d 1309 (7th Cir. 1974), *cert. denied*, 425 U.S. 997 (1976) 13

Watford v. Heckler, 765 F.2d 1562 (11th Cir. 1985) 14, 19, 20

White v. City of Richmond, 713 F.2d 458 (9th Cir. 1983) 13, 19

Wilderness Society v. Morton, 495 F.2d 1026 (D.C. Cir. 1974), *reversed sub nom., Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975) 25

Williams v. Thomas, 692 F.2d 1032 (5th Cir. 1982), *cert. denied*, 462 U.S. 1133 (1983) 13

Yates v. Mobile County Personnel Bd., 719 F.2d 1530 (11th Cir. 1983) 14, 19

Statutes

29 U.S.C. § 185 ..... 2, 7

29 U.S.C. § 411 ..... 1, 2, 3, 6, 7

29 U.S.C. § 412 ..... 1, 7

29 U.S.C. § 481 (c) 2, 3, 7

29 U.S.C. § 501 ..... 2, 3, 4, 7

29 U.S.C. § 523 ..... 2, 7

29 U.S.C. § 529 ..... 2, 4, 7

29 U.S.C. § 530 ..... 2, 3, 7

42 U.S.C. § 1981 ..... 2, 4
42 U.S.C. § 1985 (3) 2, 4, 6, 7, 23
42 U.S.C. § 1988 ..... *passim*

Other Sources

Code of Professional Responsibility, Disciplinary Rule 2-106 13
Berger, *Court Awarded Attorneys' Fees: What is 'Reasonable'?*, 126 U.PENN.LAW REV. 281 (1977) 29
Report of the Third Circuit Task Force on Court Awarded Attorney Fees, dated October 8, 1985, contained in 771 F.2d No. 2 ..... 12, 24

Petitioners, International Union of Operating Engineers, Local 18 respectfully request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on September 30, 1985.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is unreported and is reprinted at A-466 of the Appendix to this Petition. The opinion of the United States District Court for the Northern District of Ohio, dated July 18, 1978, is reported at 99 L.R.R.M. 2074 (N.D. Ohio 1978) and is reprinted at A-1 of the Appendix to this Petition. The October 14, 1982 opinion of the United States District Court is unreported and is reprinted at A-377 of the Appendix.

JURISDICTION

The judgment sought to be reviewed by this Petition was rendered and entered on September 30, 1985. This Petition for Certiorari is filed within ninety days of that date. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Because of their length, the following statutes are set forth verbatim in the Appendix, A-504-A-505:

29 U.S.C. §§ 411(a)(1), (2), (5)

29 U.S.C. § 412

42 U.S.C. § 1988

STATEMENT OF THE CASE

This action was initiated by William Murphy ["Murphy"] against Local 18 of the International Union of Operating Engineers ["Local 18" or "Union"], President Charles Rutherford, Business Manager John Possehl, Vice-President John Frank, Conductor Frank Miller and the Chairman of the Election Committee, S. S. Blair. In his original Complaint filed in December, 1973, Murphy alleged that the defendants had violated his rights under Title I of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 411 ["LMRDA"].

At the conclusion of the plaintiff's case, the plaintiff successfully moved to amend his complaint adding allegations under the Civil Rights Act of 1866 and 1871, 42 U.S.C. §§ 1981 and 1985(3). At the end of trial, Murphy was further permitted to amend his Complaint, adding a number of claims under §§ 481(c), 501, 529, 530 and 523 of the LMRDA, two claims under § 301 of the Labor-Management Relations Act, 29 U.S.C. § 185 ["LMRA"], and a number of pendent claims under Ohio law.

On July 18, 1978, the district court issued findings of fact and conclusions of law. The court entered judgment in favor of defendants Rutherford, Blair and Miller. The court also dismissed most of the allegations against defendants Local 18, Possehl and Frank, while imposing liability under some portions of the Amended Complaint. On October 14, 1982, the court issued a supplemental decision modifying its earlier judgment concerning punitive damages and deciding various motions for costs and attorney's fees.

A. July 18, 1978 Decision Of The District Court

The district court held that Local 18 did not violate § 411 (a) (1) or (5) of the LMRDA, stating that Murphy had failed to show improper refusal on behalf of Local 18 to accept his phone service as a substitute in the referral process; failed to show that the Union improperly refused him access to referral lists; failed to prove discrimination in the right to vote, to nominate candidates, or to speak at meetings; and failed to show that the Union improperly denied him access to the Union's newsletter, the *Buckeye Engineer*.

Murphy also failed to show that the Union improperly conducted elections. Murphy's allegations in this regard, characterized as § 411 violations, were rejected by the district court even when considering those charges properly before the court under § 481(c).[1] Similarly, Murphy's claims under §§ 501 and 530 of the LMRDA were deemed to be beyond the jurisdiction of the court. The court further rejected Murphy's claim that he had a right to copy membership lists.

At the heart of Murphy's charges was the denial of a "full and fair hearing" guaranteed by § 411(a)(5)(c) of the LMRDA, occurring during his intra-Union trial for theft of an election control list. The district court rejected Murphy's claims that the trial and subsequent suspension were contrived to preclude Murphy's candidacy for Union office and rejected each of Murphy's challenges to the pretrial procedures and rulings connected with such trial.

The district court characterized Murphy's intra-Union trial as "orderly and efficient" rejecting Murphy's claims

---

1. Some of these allegations fell within the exclusive jurisdiction of the Department of Labor.

of evidentiary impropriety and found that the sentence imposed was not excessive. Although the court found that the defendants had "manipulated" the composition of Murphy's jury, it concluded that § 529 of the LMRDA had not been violated.

Despite the Sixth Circuit Court of Appeals' previous rulings to the contrary in *IUOE, Local 18 v. NLRB*, 496 F.2d 1308 (6th Cir. 1974) and *IUOE, Local 18 v. NLRB*, 555 F.2d 552 (6th Cir. 1977), the district court agreed with Murphy's contentions that the Union had unlawfully refused to re-register Murphy's work card and that the Union had unlawfully failed to reinstate Murphy at the end of his suspension.

With regard to Murphy's civil rights claims, the district court rejected Murphy's claimed violation of 42 U.S.C. § 1981, while it held defendants Frank and Possehl jointly and severally liable for conspiring to violate Murphy's civil rights under 42 U.S.C. § 1985(3) and held Local 18 "vicariously liable" for the "conspiracy".

The district court rejected the bulk of Murphy's pendent claims against the defendants under Ohio law, including claims of abuse of process and defamation. The court further ruled that Murphy's allegations of malicious interference with contractual and associational rights were included within his claim for breach of contract. Although the district court held that there was no breach of contract in Murphy's trial for theft of the election control list, the court did find a breach of contract with Murphy through discrimination in employment referrals. The court also found against the defendants for assault and battery and civil conspiracy. Although the court found Murphy's claims under § 501 to be improper, it entered but then vacated judgment against Possehl for violation of his common law fiduciary duties.

On the basis of the foregoing, the district court awarded Murphy compensatory damages in the amount of $10,000, as well as punitive damages in the amounts of $30,000 against Possehl, $20,000 against Frank, and $150,000 against Local 18. The court then vacated the award against Possehl, who had passed away subsequent to the end of trial but prior to the entry of judgment. The district court deferred execution of the judgment and offered to consider vacating the punitives against Frank and Local 18, provided that Frank agree not to be a Union officer for five years and provided that Local 18 submit a plan to the court to maintain open and accessible channels of communication to all candidates for Union office.

The court also ordered injunctive relief against the defendants, while deferring its ruling on the propriety of attorney fees. Three out of four of the court's rulings with respect to injunctive relief were limited to Murphy himself, and did not benefit other members. These included the obligation to expunge Murphy's record, to refrain from interfering with Murphy's exercise of LMRDA rights, and to refrain from discriminating against Murphy in the referral system.[2]

B. October 14, 1982 Post-Judgment Memorandum Opinion And Order

In its post-judgment opinion, the district court vacated its punitive damage award against Frank because he agreed not to seek or hold Union office for five years. The punitive damage award against Local 18 was also vacated upon the Union's voluntary submission of a plan to make its decision-making and referrals more democratic

---

2. *Murphy v. International Union of Operating Engineers, Local 18, et al.*, 99 L.R.R.M. 2074 (N.D. Ohio 1978), A-1.

in nature. The court also denied Murphy's motion to tax as costs the fees of his expert witness. The court further awarded attorney fees against Local 18 based on the Civil Rights Attorneys' Fees Act of 1976, 42 U.S.C. § 1988 and based on the "bad faith" and "common benefit" exceptions to the American Rule on attorney fees. The fees were in the amount totaling $33,107.50 for work performed by Legal Aid attorney Stege and $100,232.50 for work performed by private attorney Ruben. The court denied Murphy's request to have his expert witness fees taxed as costs, taxing $1,821.46 to defendants for other costs.

C. Appeal And Cross-Appeal To The Sixth Circuit

Local 18 appealed the district court's judgment, arguing that the court erroneously found common law and statutory violations. The Union also challenged as erroneous the award of attorney fees and the excessiveness of the amount awarded.

Murphy cross-appealed, claiming that the district court erroneously vacated its award of punitive damages and should have taxed his expert witness fees as costs. Murphy further challenged the district court's determination that the Union's refusal to provide access to the Union newspaper was in violation of 29 U.S.C. § 411.

The Sixth Circuit Court of Appeals, on September 30, 1985, affirmed the outcome of the district court's opinion, although on different bases. The appeals court agreed with the Union that Murphy's § 1985(3) claim was barred by the *en banc* decision in *Shimman v. International Union of Operating Engineers, Local 18*, 744 F.2d 1226 (6th Cir. 1984), *cert. denied*, 105 S. Ct. 1191 (1985). Regarding the other claims raised in Murphy's Amended Complaint,

under §§ 481(c), 501, 523, 529 and 530 of the LMRDA and § 185 of the LMRA, the Sixth Circuit found meritorious the claims made by the Union, but determined that the district court opinion could be affirmed solely upon findings of liability under §§ 411 and 412 of the LMRDA. Because the appeals court rejected Murphy's § 1985(3) cause of action, attorney fees could not be justified under 42 U.S.C. § 1988. The court also determined that Murphy was not entitled to fees under the "bad faith" theory, but found the "common benefit" theory to apply. The court further held that the award of attorney fees was not excessive.

The Sixth Circuit denied each of Murphy's claims made on cross-appeal.

Petitioner Union now seeks review before this Court of the September 30, 1985 judgment of the Sixth Circuit Court of Appeals, with regard to the award of attorney fees and the excessiveness of the amount awarded.

REASONS FOR GRANTING THE WRIT

I. INTRODUCTION

A decision by the Supreme Court is necessary to correct a substantial conflict among the circuits concerning the application of the common benefit equitable exception to the American Rule on attorney fees, as well as the factors to be applied in conferring a fee award under a non-punitive equitable exception. This case addresses an additional facet of the attorney fees calculation questions to be considered by this Court in *City of Riverside v. Rivera*, 763 F.2d 1580 (9th Cir. 1985), *cert. granted*, No. 85-224, and *City of McKeesport v. Cunningham*, 753 F.2d

262 (3d Cir. 1985), *petition for cert. filed*, No. 84-1793. The conflicts and errors created by the Sixth Circuit in the present case are summarized below.

First, the Sixth Circuit erroneously failed to consider any factors beyond the hours submitted and a reasonable rate in computing fees awarded under the "common benefit" rationale, in direct conflict with a majority of the circuits. Furthermore, the Sixth Circuit has construed this Court's decisions in the statutory fee cases *Hensley v. Eckerhart*, 461 U.S. 424 (1983) and *Blum v. Stenson*, ... U.S. ....., 79 L. Ed. 2d 891, 104 S. Ct. ..... (1984), as warranting its failure to consider such essential factors in computing fees awarded under the "common benefit" rationale and as failing to disapprove of a similar approach taken in *Northcross v. Board of Education of Memphis City Schools*, 611 F.2d 624 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980), another statutory fee case. This position conflicts with prior decisions of this Supreme Court, as interpreted by a majority of the other circuits.

Second, in awarding attorney fees under the "common benefit" theory the Sixth Circuit failed to consider that "common benefit" awards subsume a rationale distinct from that present in statutory fee cases, thus requiring an additional determination or consideration as to the proportionate share of the costs incurred by the plaintiff in obtaining the benefit conferred. While this Court has addressed certain aspects of calculating statutory fee awards pursuant to 42 U.S.C. § 1988, and recently agreed to determine whether additional factors should be considered in *City of Riverside v. Rivera*,[3]

---

3. In *Rivera*, this Court will consider the disproportionality of the attorney fee award as compared to the plaintiff's recovery.

(Continued on following page)

this Court has not addressed whether the same factors must be applied in common benefit cases.

Third, the Sixth Circuit's decision that there could be an award of over $100,000 in attorney fees for work performed by the plaintiff's private attorney and over $33,000 in fees for work performed by his Legal Aid attorney, under the "common benefit" equitable exception to the American Rule, although by agreement the plaintiff owed no fees to his private attorney or to his Legal Aid attorney, is contrary to decisions in every other circuit and to this Court's decisions in *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970); *Hall v. Cole*, 412 U.S. 1 (1973); and *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975).

II. THE SIXTH CIRCUIT INCORRECTLY AFFIRMED THE DISTRICT COURT DECISION TO AWARD ATTORNEY FEES WITHOUT CONSIDERING ANY FACTORS IN CALCULATING THE FEES BEYOND THE HOURS SUBMITTED AND REASONABLE RATE, IN DIRECT CONFLICT WITH DECISIONS IN EVERY OTHER CIRCUIT AND WITH PRIOR DECISIONS OF THIS COURT, AS INTERPRETED BY A MAJORITY OF THE CIRCUITS.

In its Post-Judgment Memorandum Opinion and Order, the district court in the present case awarded

---

Footnote continued—

Such disproportionality also exists in the present case. Murphy recovered $10,000 in compensatory damages plus an amount in back wages which is anticipated to be less than $30,000, although yet to be determined by the district court. The injunctive relief granted was largely personal to Murphy. Nonetheless, there was an award of attorney fees in excess of $133,000.

$33,107.50 for work performed by Mr. Stege and $100,232.50 for work performed by Mr. Ruben, for every minute of time they submitted.[4] The only reduction in the amount of fees requested by respondent's attorneys, was the district court's reduction in Mr. Ruben's hourly rate of $85 per hour for the years 1975-1976. The court reduced Ruben's rate to $80 per hour.

In making its award, the district court refused to adjust the attorney fees assessed to reflect any duplicative time between the attorneys' pre-litigation and non-litigation time, any time spent litigating unsuccessful claims, or the failure to submit contemporaneously kept and prepared time records. In non-litigation time, labeled as "office" time, attorney Stege submitted 341 hours and attorney Ruben submitted 1030 hours. Litigation time, including depositions, was assessed at 141 hours for attorney Stege and 204.5 hours for attorney Ruben. No consideration was given to assessing different rates for office time as opposed to litigation time. The district court also failed to adjust for clear duplication between the attorneys in office time, as well as trial preparation and trial appearances.

Furthermore, both the district court and the Sixth Circuit Court of Appeals refused to apply any factors beyond the basic "lodestar" consideration of hours spent multiplied by a reasonable hourly rate. This approach conflicts with decisions in every other circuit.

---

4. The district court's attorney fee award, was based in part on 42 U.S.C. § 1988 and the bad faith exception to the American Rule. The Sixth Circuit negated the statutory fee basis by rejecting Murphy's § 1983 claims and the bad faith fee basis by holding that there was no bad faith during the course of the litigation. *Murphy,* Nos. 82-3702 and 82-3747, at pp. 22, 26, A-487, A-491.

A. The Sixth Circuit Incorrectly Relied On Northcross, An Opinion Unprecedented Among The Circuits And Directly Conflicting With The Positions Of Every Other Circuit

There is no uniform approach for calculating fair and reasonable attorney fees under either a statutory award of fees or fees awarded on an equitable basis. However, the approach taken by the Sixth Circuit is contrary to any other circuit's approach. One approach is best illustrated by the Fifth Circuit case, *Johnson v. Georgia Highway Express*,[5] and cases following the *Johnson* approach.

Under *Johnson*, 12 factors must be at least considered by the district court before an award of attorney fees can be made. These include: (1) the time and labor required; (2) the novelty and difficulty of the issues; (3) the legal skill required to perform the legal services; (4) the preclusion of other employment due to the acceptance of the case; (5) the customary fee; (6) the contingent or fixed nature of the fee;[6] (7) the time limitations imposed by the client or the case; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature of the professional relationship with the client; and (12) awards in similar cases. Under *Johnson*, the number of hours and the reasonable hourly rate have no more significance than any of the other factors.

---

5. 488 F.2d 714 (5th Cir. 1974).

6. Had the nature of the fee agreement in the instant case been examined, the court would have been cognizant that there was no attorney fee liability on behalf of the plaintiff, to either his Legal Aid Society attorney or his private attorney, to be spread proportionately among the members of the group benefitting from the litigation.

A second approach to awarding reasonable fees is the "lodestar" analysis first articulated in *Lindy Brothers Builders, Inc. of Philadelphia v. American Radiator & Standard Sanitary* 87 F.2d 161 (3d Cir. 1973) ("Lindy I") and *Lindy Brothers Builders, Inc. of Philadelphia v. American Radiator & Standard Sanitary Corp.*, 540 F.2d 102 (3d Cir. 1976) ("Lindy II"). The "lodestar" is composed of the number of hours reasonably expended on the case multiplied by a reasonable hourly rate. Under the strictest "lodestar" approach the "lodestar" figure may be adjusted upward or downward in rare instances to reflect only the contingent nature of success and/or the quality of work performed. The basic lodestar approach articulated by the Third Circuit, has been criticized by the Third Circuit, among others, and has been modified.[7]

Another method of calculating fees combines the lodestar method with the *Johnson* factors. The lodestar calculation is a starting point for calculating the fees. Once the lodestar figure is determined, the *Johnson* factors are applied in order to adjust the lodestar calculation upward or downward.[8] Even courts following a stricter

---

7. *See*, for example, Report of the Third Circuit Task Force on Court Awarded Attorney Fees dated October 8, 1985, contained in 771 F.2d No. 2.

8. *Second Circuit*: *McCann v. Coughlin*, 698 F.2d 112 (2d Cir. 1983).

Fourth Circuit: *Barber v. Kimbrell's, Inc.*, 577 F.2d 216 (4th Cir. 1978) (The award of attorney fees under the Truth in Lending Act was vacated because the court did not analyze the twelve *Johnson* factors); *In re Mid-Atlantic Toyota Anti-trust Litigation*, 605 F. Supp. 440 (D. Md. 1984); *Brewster v. Pike*, 608 F. Supp. 1163 (D.C. Va. 1985); *Brady v. Hartford Fire Ins. Co.*, 610 F. Supp. 735 (D.C. Md. 1985) (*Hensley* requires that upon determining lodestar amount the *Johnson* factors are to be applied).

Fifth Circuit: *Copper Liquor, Inc. v. Adolph Coors Co.*, 624 F.2d 575 (5th Cir. 1980) (Three-part analysis to be used:

(Continued on following page)

Footnote continued—

first the two lodestar factors are to be determined and multiplied, and then the *Johnson* factors must be applied to determine whether to adjust that amount); *Williams v. Thomas*, 692 F.2d 1032 (5th Cir. 1982) (award of attorney fees under § 1988 requires the district court to engage in the three-part analysis of *Copper Liquor*, including consideration of *Johnson* factors); *Davis v. West Community Hosp.*, 755 F.2d 455 (5th Cir. 1985) (Attorney fees award under § 1988 must include the analysis under *Hensley v. Eckerhart* and award remanded to consider extent of success subsequent to the appeal); *Stewart v. Lubbock County, Tex.*, 767 F.2d 153 (5th Cir. 1985) (Standards enunciated in *Hensley* include consideration of *Johnson* factors); *Mandhare v. LaFargue Elementary School*, 605 F. Supp. 238 (E.D. La. 1985).

Seventh Circuit: *Bonner v. Coughlin*, 657 F.2d 931 (7th Cir. 1981) (In determining the amount of attorney fees to be awarded under § 1988, the eight factors set forth in the Code of Professional Responsibility, Disciplinary Rule 2-106 must be considered, as well as other factors); *State of Ill. v. Sangamo Const. Co.*, 657 F.2d 855 (7th Cir. 1981) (The district court must consider the lodestar amount and then may adjust that amount upon a consideration of factors listed in *Waters v. Wisconsin Steel Works*, 502 F.2d 1309, 1322 (7th Cir. 1974), *cert. denied*, 425 U.S. 997 (1976) which are basically same as *Johnson* factors); *Lynch v. City of Milwaukee*, 747 F.2d 423 (7th Cir. 1984) (In § 1988 action, under *Hensley* the *Johnson* factors considered to determine "reasonableness" in lodestar or applied upon determination of lodestar).

Eighth Circuit: The following cases require that the *Johnson* factors be considered in order to determine whether the basic lodestar amount should be adjusted: *Ladies Ctr., Nebraska, Inc. v. Thone*, 645 F.2d 645 (8th Cir. 1981) (§ 1988 fee award); *Jaquette v. Black Hawk County, Iowa*, 710 F.2d 455 (8th Cir. 1983) (§ 1988 fee award); and *Easley v. Anheuser-Busch, Inc.*, 758 F.2d 251 (8th Cir. 1985) (The *Johnson* guidelines adopted by this court must be considered either in the initial calculation of the reasonableness of the lodestar amounts or in determining whether to adjust the lodestar figure); *Jones v. MacMillan Bloedel Containers, Inc.*, 685 F.2d 236 (8th Cir. 1982).

Ninth Circuit: *Moore v. Jas. H. Matthews & Co.*, 682 F.2d 830, 839-840 (9th Cir. 1982) (The award of attorney fees under the Sherman Anti-Trust Act must entail consideration of amount of time spent on unsuccessful claims, as well as a "blending" of the lodestar calculation and the *Johnson/Kerr* factors); *White v. City of Richmond*, 713 F.2d 458 (9th Cir. 1983).

Tenth Circuit: *Ramos v. Lamm*, 713 F.2d 546 (10th Cir. 1983) (As in *Hensley*, starting point in statutory fee determination is the lodestar figure, distinguishing "raw" time from "billable" time, considering duplication and amounts listed for spe-

(Continued on following page)

lodestar approach have applied other factors bearing on the fee award, as set forth in the margin.[9]

Footnote continued—

cific tasks, contemporaneous time records and results obtained as well as other *Johnson* factors); *Brewer v. Southern Union Co.*, 607 F. Supp. 1511 (D.C. Colo. 1984) (Extensive review of the method of calculating attorney fees, lending support for using lodestar calculation as the starting point and the *Johnson* factors are considered and sometimes applied to adjust the lodestar amount).

Eleventh Circuit: *Marion v. Barrier*, 694 F.2d 229 (11th Cir. 1982) (*Johnson* factors upheld and are to be balanced in § 1988 case); *Yates v. Mobile County Personnel Bd.*, 719 F.2d 1530 (11th Cir. 1983) (In determining attorney fees under § 1988, the extent of success is crucial and factors must be considered in addition to reasonable hourly rate and reasonable fees); *Jones v. Central Soya Co., Inc.*, 748 F.2d 586 (11th Cir. 1984) (In age discrimination case, the determination of the reasonableness of lodestar figure, must include a review of the *Johnson* factors); *Varner v. Century Finance Co., Inc.*, 738 F.2d 1143 (11th Cir. 1984) (A district court award in attorney fees under Truth in Lending Act, must consider *Johnson* factors that are litigated); *Watford v. Heckler*, 765 F.2d 1562 (11th Cir. 1985) (The lodestar determination is a reasonable starting point in determining fees under the Equal Access to Justice Act, and the other *Johnson* factors must be considered to determine whether there must be an adjustment to the lodestar, citing *Hensley* at 433-34, *Jones* at 588-89, and *Varner* at 1148); *Curry v. Block*, 608 F. Supp. 1407 (D.C. Ga. 1985).

9. *First Circuit*: *Furtado v. Bishop*, 635 F.2d 915 (1st Cir. 1980) (Two steps to the analysis involve determining the "lodestar" and adjusting that amount to reflect the contingent nature of the fee, delay in payment, quality of representation, exceptional results obtained, and other factors enunciated in the *Copeland* case); *Souza v. Southworth*, 564 F.2d 609 (1st Cir. 1977) (District court incorrectly multiplied numbers of hours by market rate without regard to significance or complexity of the litigation and with the incorrect assumption that every hour was billable at the same rate); *Segal v. Gilbert Color Systems, Inc.*, 746 F.2d 78 (1st Cir. 1984) (Once the lodestar is determined, it may be adjusted as delineated in the *Furtado* and *Copeland* cases); *Grendel's Den, Inc. v. Larkin*, 749 F.2d 945 (1st Cir. 1984) (The "lodestar" is merely a "point of reference" obtained by considering number of hours actually spent less any duplicative, unproductive, excessive, or otherwise unnecessary hours, as well as the type of work performed, who performed it, the expertise required and when it was undertaken. That amount is then

(Continued on following page)

In the present case both the district court and the Sixth Circuit Court of Appeals relied on the Sixth Circuit case, *Northcross v. Board of Education of Memphis City Schools*,[10] as support for refusing to apply any factors beyond the basic lodestar calculation. The Sixth Circuit in *Northcross* established guidelines for awarding attorney fees pursuant to the Civil Rights Attorney's Fees Awards Act of 1976.[11] The *Northcross* court decided that once the prevailing party was determined:

> . . . [t]hey are entitled to recover attorneys' fees for 'all time reasonably spent on a matter'. The fact that some of that time was spent in pursuing issues or research which was ultimately unproductive, re-

---

Footnote continued—

adjusted by the factors enumerated in *Furtado* and *Copeland*); *Hart v. Bourque*, 608 F. Supp. 1091 (D.C. Mass. 1985).

Second Circuit: *City of Detroit v. Grinnell Corp.*, 560 F.2d 1093 (2d Cir. 1977).

Third Circuit: *Bagby v. Beal*, 606 F.2d 411, 416 (3d Cir. 1979) (In § 1988 fees case, to determine reasonableness of award, *Johnson* factors must be considered); *Inmates of Allegheny County Jail v. Pierce*, 716 F.2d 177 (3d Cir. 1983) (*Hensley* requires an evaluation of the interrelationship between successful and unsuccessful claims and thus the extent of success and amount of the fee award); *Institutionalized Juveniles v. Sec. of Pub. Wel.*, 758 F.2d 897 (3d Cir. 1985); *Hummel v. Brennan*, 83 F.R.D. 141 (E.D. Pa. 1979) (Attorney fees awarded, based on *Hall v. Cole* by determining lodestar and then applying nine factors found in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 470 (2d Cir. 1974).)

D.C. Circuit: *Copeland v. Marshall*, 641 F.2d 880 (D.C. Cir. 1980) (*en banc*) (Although the *Johnson* factors are central to any fee award, the lodestar is the starting point and it is adjusted by contingent nature of success and quality of representation, including the extent of success. Hours not included if spent on non-productive time, time spent on unsuccessful claims, or duplicative time); *Laffey v. Northwest Airlines, Inc.*, 746 F.2d 4 (D.C. Cir. 1984).

10. 611 F.2d 624 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980).

11. 42 U.S.C. § 1988 (1976).

> jected by the court, or mooted by intervening events is wholly irrelevant. *So long as the party has prevailed on the case as a whole the district courts are to allow compensation for hours expended on unsuccessful research or litigation, unless the positions asserted are frivolous or in bad faith.*[12]

The district court in the present case, based on *Northcross*, stated:

> Having reviewed the affidavits of attorneys Stege and Ruben, this Court concludes that they neither claimed unjustified hours nor duplicated each other's services. This Court will neither deduct hours for cause nor arbitrarily deduct a small percentage of the total hours for duplication of services. This Court finds that the hours for which attorneys Stege and Ruben are entitled to compensation are accurately summarized in the above chart.[13]

The chart referred to by the court merely listed the number of hours each attorney had devoted to "office" matters and to "litigation". The district court did not consider applying different rates for office time, trial preparation or litigation time. The court also failed to adjust for clear duplication between the attorneys in office time, duplicative trial preparation and briefs, as well as duplication in trial appearances. Proof of contemporaneous time records was not required by the court.[14]

---

12. 611 F.2d at 636. (Emphasis added.) *See also, Stewart v. Rhodes*, 656 F.2d 1216 (6th Cir. 1981); *Louisville Black Police Officers v. City of Louisville*, 700 F.2d 268 (6th Cir. 1983).

13. Post-Judgment Memorandum Opinion and Order, p. 19, A-419, 420.

14. For examples of cases requiring contemporaneous time records, *see Grendel's Den, Inc. v. Larkin*, 749 F.2d 945 (1st

(Continued on following page)

The Sixth Circuit, in the present case, did not condone an award of attorney fees on either a statutory fee basis or bad faith basis.[15] Instead, the Sixth Circuit condoned the award of fees under the common benefit rationale,[16] citing the following language of this Court in *Hensley v. Eckerhart*:

> The district court also may consider other factors identified in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-719 (CA5 1974), though it should note that many of these factors usually are subsumed within the initial calculation of hours reasonably expended at a reasonable hourly rate. *See Copeland v. Marshall*, 205 U.S. App.D.C. 390, 400, 641 F.2d 880, 890 (1980) (*en banc*).[17]

Referring to the *Johnson* case, the Sixth Circuit further stated:

> In *Northcross*, the Sixth Circuit expressly rejected this checklist approach to fee determinations. Instead the Sixth Circuit held that a district court need only consider the hours of service provided (and whether those hours were reasonable under the circumstances) and a reasonable rate of compensation. 611 F.2d at 636-39. The Sixth Circuit found that such an approach

---

Footnote continued—

Cir. 1984); *New York Ass'n For Retarded Children v. Carey*, 711 F.2d 1136, 1148 (2d Cir. 1983); *Ramos v. Lamm*, 713 F.2d 546, 553 (10th Cir. 1983); and *National Ass'n of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319, 1327 (D.C. Cir. 1982).

15. *Murphy*, Nos. 82-3702 and 82-3747, at pp. 21, n.7 and 22, A-486, A-487.

16. *See infra*, pp. 21-26.

17. *Murphy*, Nos. 82-3702 and 82-3747, at p. 24, A-489, citing *Hensley v. Eckerhart*, 461 U.S. 424, 434 n.9 (1983).

'will take into account all the relevant factors, and will lead to a reasonable result'. *Id.* at 642.[18]

Thus, under the Sixth Circuit approach, once the lodestar amount is determined, the district court need only consider whether the positions asserted are frivolous or in bad faith. In so holding, the Sixth Circuit's position is contrary to that taken by every other circuit.[19]

The Court should take this opportunity to resolve the conflict among the circuits and to clarify the factors to be considered in making a reasonable and fair attorney fee award under exceptions to the American Rule. The existence of the conflict among the circuits and this Court's recent decision to review the factors involved with another attorney fee award[20] strongly suggests that the time is ripe for a decision by this Supreme Court on this issue.

B. The Sixth Circuit's Attorney Fees Holding Conflicts With Prior Decisions Of The Supreme Court, As Interpreted By A Majority Of The Circuits

The Sixth Circuit stated in the present case, that this Court's decision in *Hensley v. Eckerhart*, 461 U.S. 424 (1983) neither approved the application of the *Johnson* factors nor disapproved the Sixth Circuit approach in *Northcross*. The *Northcross* court, followed in the present case, opined that, "So long as the party has prevailed as a whole the district courts are to allow compensation for

---

18. *Murphy*, Nos. 82-3702 and 82-3747, at p. 24, A-489.

19. *See supra*, pp. 12-15.

20. *City of Riverside v. Rivera*, 763 F.2d 1580 (9th Cir. 1985), *cert. granted*, No. 85-224. Also pending is a petition for certiorari in *City of McKeesport v. Cunningham*, 753 F.2d 262 (3d Cir. 1985), *petition for cert. filed*, No. 84-1793.

hours expended on unsuccessful research or litigation, unless the positions asserted are frivolous or in bad faith."[21]

Contrary to the position taken by the Sixth Circuit, a majority of the circuits have interpreted *Hensley* in determining a reasonable fee award, as providing that although such an award begins with the lodestar calculation, the lodestar does not end the analysis. Other factors may, and in some cases must be considered, according to this interpretation of *Hensley*,[22] and the *Johnson* factors may be used to modify the award.[23] In addition, the

---

21. 611 F.2d at 636.

22. Cases interpreting *Hensley* in this manner include:

First Circuit: *Grendel's Den, Inc. v. Larkin*, 749 F.2d 945 (1st Cir. 1984); *Segal v. Gilbert Color Systems, Inc.*, 746 F.2d 78 (1st Cir. 1984); *Hart v. Bourque*, 608 F. Supp 1091 (D.C. Mass. 1985).

Third Circuit: *Institutionalized Juveniles v. Sec. of Pub. Wel.*, 758 F.2d 897 (3d Cir. 1985).

Fourth Circuit: *Brady v. Hartford Fire Ins. Co.*, 610 F. Supp. 735 (D.C. Md. 1985).

Fifth Circuit: *Stewart v. Lubbock County, Tex.*, 767 F.2d 153 (5th Cir. 1985).

Seventh Circuit: *Ohio-Sealy Mattress Manuf. Co., et al. v. Sealy, Inc., et al.*, Case Nos. 84-2886 and 84-2926 (7th Cir., Oct. 21, 1985); *Lynch v. City of Milwaukee*, 747 F.2d 423 (7th Cir. 1984).

Eighth Circuit: *Tusa v. Omaha Auto Auction, Inc.*, 712 F.2d 1248 (8th Cir. 1983); *Easley v. Anheuser-Busch, Inc.*, 758 F.2d 251 (8th Cir. 1985).

Ninth Circuit: *White v. City of Richmond*, 713 F.2d 458 (9th Cir. 1983).

Tenth Circuit: *Brewer v. Southern Union Co.*, 607 F. Supp. 1511 (D.C. Colo. 1984); *Ramos v. Lamm*, 713 F.2d 546 (10th Cir. 1983).

Eleventh Circuit: *Watford v. Heckler*, 765 F.2d 1562 (11th Cir. 1985); *Jones v. Central Soya Co., Inc.*, 748 F.2d 586 (11th Cir. 1984); *Yates v. Mobile County Personnel Bd.*, 719 F.2d 1530 (11th Cir. 1983); *Curry v. Block*, 608 F. Supp. 1407 (D.C. Ga. 1984).

D.C. Circuit: *Laffey v. Northwest Airlines, Inc.*, 746 F.2d 4 (D.C. Cir. 1984).

23. *See supra*, footnote 9, p. 15.

Hensley case has been interpreted to require consideration of the extent of plaintiff's success, in order to determine whether reduction for partial success is in order.[24] To the contrary, the Sixth Circuit in the present case refused to read *Hensley* as requiring consideration of the "results obtained" *Johnson* factor.[25]

Further support for interpreting *Hensley* as approving the application of the *Johnson* factors can be found in footnote 8 of the concurring and dissenting opinion of Justices Brennan, Marshall, Blackmun and Stevens in *Hensley,* where the Justices state that the court had expressly approved the *Johnson* factors.[26]

III. THE SIXTH CIRCUIT'S ATTORNEY FEES DECISION, RELYING ON STATUTORY FEE CASES, DISREGARDED THE ESSENTIAL DIFFERENCES BETWEEN FEES BASED ON THE COMMON BENEFIT RATIONALE AND STATUTORY FEE AWARDS, AND THUS CONFLICTS WITH THIS COURT'S PRIOR COMMON BENEFIT OPINIONS.

The longstanding American Rule prohibiting an award of attorney fees to a prevailing party in the absence of

---

24. *See Inmates of Allegheny County Jail v. Pierce,* 716 F.2d 177 (3d Cir. 1983); *Institutionalized Juveniles v. Sec. of Pub. Wel.,* 758 F.2d 897 (3d Cir. 1985) (The district court must, under *Hensley,* consider the relationship between the extent of success and the amount of the fee award); *Davis v. West Community Hosp.,* 755 F.2d 455 (5th Cir. 1985) (Although the district court properly considered the relationship between the extent of success and the fee award, remanded in view of lesser success after appeal); *Tusa v. Omaha Auto Auction, Inc.,* 712 F.2d 1248 (8th Cir. 1983); *Watford v. Heckler,* 765 F.2d 1562 (11th Cir. 1985).

25. *Murphy,* Nos. 82-3702 and 82-3747, at pp. 23, 24, A-488, A-489.

26. 461 U.S. at 55.

a statute or contract providing for such an award, has been regularly reaffirmed by the Supreme Court in numerous decisions.[27]

Several narrow exceptions have been judicially carved out of the American Rule, including the "bad faith"[28] exception and the "common benefit" exception. This Court's decision in *Hall v. Cole*, 412 U.S. 1 (1973) set forth the present day formulation in LMRDA cases of the "common benefit" exception recognized in *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970).

In *Mills*, this Court extended the earlier "common fund" rationale, under which one who initiates a lawsuit resulting in the creation of or increase in a fund in which others have a common interest, to allow reimbursement from the fund for litigation expenses incurred. This Court in *Mills* allowed an award of attorney fees to a plaintiff whose litigation conferred a non-pecuniary benefit on others, reasoning that the plaintiff's lawsuit "[h]as conferred a substantial benefit on the members of an ascertainable class, and where the court's jurisdiction over the subject matter of the suit makes possible an award that will operate to spread the costs proportionately among them."[29]

---

27. *Hensley v. Eckerhart*, 461 U.S. 424 (1983); *Summit Valley Industries v. Local 112, United Brotherhood of Carpenters*, 456 U.S. 717 (1982); *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975); and *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970).

28. The Sixth Circuit in the present case rejected the district court's award of fees under the "bad faith" theory, citing *Shimman v. International Union of Operating Engineers, Local 18*, 744 F.2d 1226 (6th Cir. 1984) (*en banc*), *cert. denied*, 105 S.Ct. 1191 (1985) as allowing a "bad faith" award only for bad faith during the course of the litigation. The "private attorney general" exception was overruled by this Court in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975).

29. 396 U.S. at 393-94.

In *Hall v. Cole*,[30] this Court held that the plaintiff, by vindicating his own right to free speech, rendered a substantial service or "common benefit" to the Union as an institution, and to all of its members. More specifically, this Court provided for the common benefit exception where a plaintiff confers:

> "[a] substantial benefit on the members of an ascertainable class, and where the court's jurisdiction over the subject matter of the suit makes possible an award that will operate to spread the costs proportionately among them." *Mills v. Electric Auto-Lite, supra*, at 393-394. "Fee-shifting" is justified in these cases, not because of any "bad faith" of the defendant but, rather, because "[t]o allow the others to obtain full benefit from the plaintiff's efforts without contributing equally to the litigation expenses would be to enrich the others unjustly *at the plaintiff's expense*." *Id.*, at 392; *see also Fleischmann Distilling Corp. v. Maier Brewing Co., supra*, at 719, *Trustees v. Greenough*, 105 U.S. 527, 532 (1882).[31]

The Sixth Circuit in the present case held that attorney fees were only to be awarded under the common benefit exception to the American Rule, rejecting the bad faith and statutory fee bases.

Attorney fees would have also been precluded under the common benefit rationale, if the Union had not voluntarily expended a great deal of time and money to develop a new referral system plan. As a result of the Union's efforts, the district court vacated the punitive damage award previously assessed against the Union.

---

30. 412 U.S. 1 (1973).

31. 412 U.S. at pp. 5-6 (Footnotes omitted.) (Emphasis added.)

Had the Union instead chosen to pay the punitives, the group would have not have been benefitted in the same manner as *Murphy* and common benefit fees would have been precluded under *Shimman v. International Union of Operating Engineers, Local 18.*[32] Curiously, the voluntary action of the Union served to penalize the membership. This resulted from the Sixth Circuit's incorrect reliance on statutory fee cases, while at the same time precluding recovery under § 1985 (3), without further consideration as to the necessity for applying additional factors in common benefit fee award cases.

This Court has not directly considered whether its decisions in *Hensley v. Eckerhart*[33] and *Blum v. Stenson*[34] are applicable to common benefit cases, and whether additional factors must be considered in common benefit cases. However, this Court has recognized the distinction between statutory fee cases and equitable fee cases.[35]

Unlike statutory fee cases which shift the attorney fees to the unsuccessful litigant and calculate a reasonable fee by measuring the amount of attorney time reasonably expended, common benefit attorney fees must be calculated so as to spread proportionately among the membership of the class benefitting from the plaintiff's acts, the plaintiff's litigation expenses, in order to avoid unjust enrichment on the part of those who benefitted at the plaintiff's expense.[36] In cases decided under the equitable doctrine, the parties paying the fee award are not before

---

32. 744 F.2d 1226 (6th Cir. 1984) (*en banc*), *cert. denied*, 105 S. Ct. 1191 (1985).

33. 461 U.S. 424 (1983).

34. ..... U.S. ....., 79 L. Ed. 2d 891, 104 S. Ct. ..... (1984).

35. *Blum*, 79 L. Ed. 2d at 903.

36. *See supra*, pp. 21, 22.

the court, as in statutory fee cases, necessitating a heightened fiduciary role by the judge on behalf of the beneficiaries.[37]

Public policy considerations in statutory fee cases are distinct from common benefit cases. This Court in *Alyeska Pipeline Service Co. v. Wilderness Society,* rejected the application of an equitable basis for an attorney fee award when a plaintiff acted as a "private attorney general", ruling that the authorization for such fee awards must be granted by Congress.[38] In response to that ruling, Congress enacted the Civil Rights Attorneys' Fees Awards Act of 1976.[39] It has been stated that:

> Civil rights plaintiffs with meritorious claims "appear before the court cloaked in a mantle of public interest."[40]

Congress asserted that the public as a whole has an interest in the vindication of civil rights. While in the past courts used the common benefit exception to extend the American

---

37. *See Blum,* 79 L. Ed. 2d at 903 and Report of the Third Circuit Task Force on Court Awarded Attorney Fees, dated Oct. 8, 1985, contained at 771 F.2d No. 2 at p. 20 and at p. 25 the following appears:

> Upon reflection, the Task Force agreed that the fundamental differences between statutory fee and fund-in-court cases should be recognized in the fee setting process. Treating these two categories of cases in variant ways to best achieve their policy objectives appear sound especially in light of footnote 16 of Justice Powell's opinion in *Blum v. Stenson,* quoted earlier. (Footnotes omitted.)

38. *Northcross v. Board of Ed. of Memphis City Schools,* 611 F.2d 624, 632 (6th Cir. 1979), *cert. denied,* 447 U.S. 911 (1980), citing *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240 (1975).

39. 42 U.S.C. § 1988 (1976); *Hensley v. Eckerhart,* 461 U.S. at 56 (dissenting opinion).

40. *Hensley,* 461 U.S. at 57, citing H.R. Rep. No. 94-1558, p. 6 (1976).

Rule further under the "private attorney general" theory to award fees to plaintiffs vindicating important statutory rights of the public as a whole,[41] such an approach was rejected in *Alyeska*. *Alyeska* did, however, approve the common benefit rationale applied in *Mills* and *Hall*, to prevent unjust enrichment at the plaintiff's expense. Clearly, in so holding, this Court recognized the distinction in the rationale behind the two approaches.

In the present case, the same rationale used in statutory fees cases wherein there is express Congressional purpose for an award of fees was incorrectly applied to a common benefit case with no consideration of additional factors in calculating the amount of the fees. The Sixth Circuit permitted the respondent to succeed as he would have under the private attorney general theory, while nonetheless designating the relief as that granted under the common benefit rationale.[42] This merger was accomplished by the Sixth Circuit, contrary to this Court's rationale in *Alyeska, Mills* and *Hall*. It is essential that this Court clarify the Sixth Circuit's fallacious determination.

---

41. *See Hoitt v. Vitek*, 495 F.2d 219 (1st Cir. 1974); *Cornist v. Richland Parish School Board*, 495 F.2d 189 (5th Cir. 1974), *modified*, 517 F.2d 1032 (5th Cir. 1975); *Knight v. Auciello*, 453 F.2d 852 (1st Cir. 1972); *Wilderness Society v. Morton*, 495 F.2d 1026 (D.C. Cir. 1974), *reversed sub nom., Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975).

42. As the Sixth Circuit stated in *Shimman v. International Union of Operating Engineers, Local 18*, 744 F.2d 1226, 1235 n.13 (6th Cir. 1984), *cert. denied*, 105 S. Ct. 1191 (1985):

> Society as a whole always benefits through general deterrence when the law is enforced. Allowing a fee award based on such benefits, however, would come close to accepting the "private attorney general" rationale, which was rejected by the Supreme Court in *Alyeska*. *The common benefit theory should not be allowed to merge into the private attorney general approach. Satoskar v. Indiana Real Estate Commission*, 517 F.2d 696 (7th Cir.), *cert. denied*, 423 U.S. 928, 96 S. Ct. 276, 46 L. Ed. 2d 256 (1975). (Emphasis added.)

IV. THE SIXTH CIRCUIT ERRONEOUSLY AFFIRMED THE DISTRICT COURT'S ABUSE OF DISCRETION IN DIRECT CONFLICT WITH CASES IN EVERY OTHER CIRCUIT AND WITH PRIOR DECISIONS OF THIS COURT BY AWARDING OVER $133,000 IN ATTORNEY FEES UNDER THE "COMMON BENEFIT" RATIONALE, ALTHOUGH BY CONTRACT THE PLAINTIFF OWED NO FEES TO HIS PRIVATE ATTORNEY OR TO HIS LEGAL AID ATTORNEY RESULTING IN THE PLAINTIFF INCURRING NO COSTS OF THE LITIGATION TO BE SPREAD PROPORTIONATELY AMONGST THE MEMBERSHIP OF THE CLASS ALLEGEDLY BENEFITTING FROM THE LITIGATION.

In the instant case, the Sixth Circuit held that attorney fees were properly awarded by the district court, only under the common benefit exception to the American Rule. The court thus rejected the district court's award of fees under the bad faith exception and under 42 U.S.C. § 1988. In placing its imprimatur on such a common benefit award, the Sixth Circuit stated:

> Here, on the other hand, without the award of attorneys' fees, Murphy will receive *no* punitive damages and only $10,000 and lost wages in compensatory damages. *Thus, without the attorneys' fee award, Murphy would suffer significant financial loss for litigating a suit that resulted in substantial benefit to the Union as a whole.*
>
> On these two bases we believe that the amount of attorneys' fee award in Murphy's favor is fully

justified upon a "common benefit" theory.[43] (Emphasis added.)

The appeals court apparently relied on Mr. Ruben's statement in his Supplemental Brief of Plaintiff-Appellee/Cross-Appellant at page 14:

> In the instant proceeding Defendants seek to escape from having to pay either punitive damages or counsel fees, and unfairly shift the burden entirely to Plaintiff Murphy to pay his attorneys out of the $10,000 compensatory damage award and whatever amount of back pay the District Court may allow.[44]

The record in this case, establishes, however, that respondent Murphy signed a power of attorney, granting private attorney Ruben full decision making authority in the instant action, and further stating:

> In no event shall I be personally responsible for attorneys' fees or any other charges, costs and expenses which may accrue in the course of litigation or in the performance of any other service hereunder.
>
> All charges, costs and other expenses will be defrayed through subventions from the American Civil Liberties Union and the Legal Aid Society of Cleveland.

The attorneys were also authorized as follows:

> To maintain a bank account for the deposit of money damages and the remission of aforesaid fine paid by myself.[45]

---

43. *Murphy*, Nos. 82-3702 and 82-3747, at p. 23, A-488.

44. Supplemental Brief of Plaintiff-Appellee/Cross-Appellant, p. 14, A-507.

45. *See* Supplemental Affidavit in Support of Plaintiff's Request For Counsel Fees, pp. 2, 3, A-509.

Based on the above agreement, the plaintiff below argued that although Murphy had no financial obligation to his attorneys, they were empowered to seek an award of counsel fees and costs against the defendants. Mr. Ruben distinguished himself from Legal Aid attorney Stege because he was not obligated to remit any fees awarded to him.[46]

The Sixth Circuit's refusal to consider any factors in addition to the number of hours spent multiplied by a reasonable hourly rate, precluded the consideration of the nature of the fee agreement between Murphy and his attorneys. Thus, the award of attorney fees in the present case, allowing attorney fees under the common benefit rationale where the plaintiff owes no fees to his private attorney is contrary to this Court's previous decisions in *Mills v. Electric Auto-Lite Co.*,[47] and *Hall v. Cole*,[48] because this is not an instance in which the Union members will be unjustly enriched at the plaintiff's expense. The respondent did not cite below, and petitioner has been unable to obtain, any case authorizing a common benefit award of attorney fees to a plaintiff who owes no fees to his private attorney. Thus, it is essential that this Court clarify the unsupportable decision of the Sixth Circuit, which directly opposes this Court's decisions.

The same reasoning applies to the award of attorney fees to Legal Aid attorney Stege. The district court refused to deny attorney fees to a Legal Aid Society attorney, citing *Incarcerated Men of Allen County Jail v. Fair*,[49] a 1974 case

---

46. *See* Reply to Defendants' Brief in Opposition to Plaintiff's Motion For Counsel Fees, p. 11, A-517.

47. 396 U.S. 375 (1970).

48. 412 U.S. 1 (1973).

49. 507 F.2d 281 (6th Cir. 1974) (The court expressed doubts as to the applicability of the "common benefit" theory to the case). *See* Post Judgment Memorandum Opinion and Order, p. 15, A-411, A-412.

brought pursuant to 42 U.S.C. § 1983 but decided prior to the enactment of 42 U.S.C. § 1988, the Civil Rights Attorneys' Fees Award Act of 1976 and prior to this Court's rejection of the "private attorney general" theory in *Alyeska Pipeline Service Co. v. Wilderness Society.*[50] *Incarcerated Men* is inapplicable to the instant case, because prevailing plaintiffs in cases brought pursuant to 42 U.S.C. § 1983 are now entitled to congressionally mandated attorney fees. The cases cited by the plaintiff below as supporting a fee award to Legal Aid Society attorneys were all statutory fee award cases.

Cases involving awards of attorney fees to Legal Aid Society attorneys pursuant to statutes cannot be cited to award fees under the common benefit rationale. While in common benefit cases, the court must exercise its power in a manner consistent with preventing unjust enrichment to the detriment of the plaintiff, in statutory fee cases attorney fees are awarded to further the congressional purpose of promoting full enforcement of the substantive rights upon which the fee awards are based.[51] Awarding fees under the common benefit rationale where a plaintiff is not responsible for fees to his attorneys and without a specific statute for such award, based on the benefit

---

50. 421 U.S. 240 (1975).

51. *See* Berger, *Court Awarded Attorneys' Fees: What is 'Reasonable'?*, 126 U.PENN.LAW REV. 281, 283 (1977). For cases holding that in furtherance of the underlying legislative intent of 42 U.S.C. § 1988, attorney fees for public interest attorneys and private firm lawyers should be calculated the same, *see Copeland v. Marshall*, 641 F.2d 880 (D.C. Cir. 1980) (*en banc*); *Palmigiano v. Garrahy*, 616 F.2d 598 (1st Cir.), *cert. denied*, 449 U.S. 839 (1980); *Reynolds v. Coomey*, 567 F.2d 1166 (1st Cir. 1978); *Torres v. Sachs*, 538 F.2d 10 (2d Cir. 1978); *Love v. Mayor of Cheyenne*, 620 F.2d 235 (10th Cir. 1980); *Ramos v. Lamm*, 713 F.2d 546, 551 (10th Cir. 1983) (Senate Report accompanying § 1988 cited two cases requiring same calculations for private and public interest attorneys).

conferred on the membership, would require a return to the "private attorney general" exception to the American Rule already rejected by this Court in *Alyeska*.

A decision by this Court is essential to clarify this misapplication of the statutory provisions allowing attorney fees for Legal Aid Society attorneys to cases based on the common benefit rationale.

CONCLUSION

Petitioner urges this Court to grant this petition, in order to eliminate the conflicts and confusion created by the Sixth Circuit's attorney fees decision based on the common benefit rationale.

Respectfully submitted,

WILLIAM FADEL, *Counsel of Record*
FRANCES M. GOTE', *On Brief*
WULIGER, FADEL & BEYER
1340 Sumner Court
The Brownell Building
Cleveland, Ohio 44115
(216) 781-7777
Counsel for Petitioners

85-1107

No.

Supreme Court, U.S.
FILED
DEC 27 1985
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

October Term, 1985

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 18, *et al.*,
Petitioners,

vs.

WILLIAM F. MURPHY,
Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals
For the Sixth Circuit

WILLIAM FADEL, *Counsel of Record*
FRANCES M. GOTE', *On Brief*
WULIGER, FADEL & BEYER
1340 Sumner Court
The Brownell Building
Cleveland, Ohio 44115
(216) 781-7777
Counsel for Petitioners

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

TABLE OF CONTENTS

Opinion, Findings of Fact and Conclusions of Law of the United States District Court (July 18, 1978) A-1

Post-Judgment Memorandum Opinion and Order of the United States District Court (October 4, 1982) A-377

Opinion of the United States Court of Appeals for the Sixth Circuit A-466

Statutes Involved:

29 U.S.C. § 411(a)(1), (2) and (5) A-504

29 U.S.C. § 412 .....A-505

42 U.S.C. § 1988 .....A-505

Supplemental Brief of Plaintiff-Appellee/Cross-Appellant, p. 14 .....A-507

Supplemental Affidavit in Support of Plaintiff's Request for Counsel Fees A-509

Reply to Defendants' Brief in Opposition to Plaintiff's Motion for Counsel Fees, p. 11 .....A-517

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

WILLIAM F. MURPHY,	)	
	)	
Plaintiff	)	No. C 73-1336
	)	
v.	)	PREFACE TO FINDINGS
	)	OF FACT AND CONCLU-
LOCAL UNION NO. 18,	)	SIONS OF LAW
18A, 18B, 18C and	)	
18RA, INTERNATIONAL	)	
UNION OF OPERATING	)	
ENGINEERS, et al.,	)	
	)	
Defendants	)	

LAMBROS, DISTRICT JUDGE

This lawsuit involves a confrontation between a union member and his union and its officers. A lengthy composition follows because it became necessary to relate the detailed operations of the union regarding its job referral system to the particulars of the relationship between the union and its members.

The lengthy evidentiary record

discloses many instances of aberrational behavior in the management of the union, which adversely affected the plaintiff and other members. It is my hope that these errors may now be corrected so that they do not become, as a wise man once said, mistakes.

Further, it is my hope that this lawsuit and the fruit it bears today will not serve as an instrument to disrupt this union; but rather, that it effectuates the concerns of Congress and the congressional effort to achieve labor reform through the years.

It is my ultimate desire that this case will serve to instill a democratic spirit that will strengthen this union, not only as an effective bargaining agent for its members, but also as an organization which assures to its members, a full and fair opportunity to

participate in its governing and administrative processes.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

WILLIAM F. MURPHY, Plaintiff	)	No. C 73-1336
v.	)	FINDINGS OF FACT AND CONCLUSIONS OF LAW
LOCAL UNION NO. 18, 18A, 18B, 18C and 18RA, INTERNATIONAL UNION OF OPERATING ENGINEERS, et al., Defendants	)	

LAMBROS, DISTRICT JUDGE

I. INTRODUCTION

Plaintiff instituted this action alleging that defendants have violated Sections 101 and 102 of the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. §§411, 412.[1/] This case came on for trial to the Court on February 26, 1976 and continued until March 16, 1976. At this time, in deference to the Court's calendar, counsel

agreed to complete the trial of this action by means of prerecorded video tape testimony.[2/] PRVTT began March 17, 1976 and concluded January 4, 1977.

At the close of his case-in-chief plaintiff amended his complaint to state claims under 42 U.S.C. §§1981, 1985(3). Plaintiff further amended his complaint at the conclusion of trial to allege violations of 29 U.S.C. §§185, 414, 481 (c), 501, 523, 529, 530, and to state eight pendant state law claims. Normally, the Court would prohibit amendments of the scope proposed by plaintiff at the close of trial. However, the use of PRVTT as the trial media provided defendants ample opportunity to reopen their case in order to present further evidence regarding these amendments, and therefore defendants have not been prejudiced thereby.

Prior to commencing PRVTT, the Court ruled on the admissibility of those exhibits which had been introduced into evidence during the traditional portion of this trial. At the close of PRVTT, counsel moved the admission of their remaining exhibits. The Court having considered these exhibits, 96 (a-h) -102 admits into evidence:

> Plaintiff's Exhibits 96(a)-(h) -- 102, 104-107, 110,[3] 114, 114(a), 116, 117, 121, 122, 124-128, 137-140;
>
> Defendants' Exhibits A-Z, AA-YY, AAA-ZZZ, AB-AZ, BA.

Additionally, the Court admits into evidence the work records of certain operation engineers set forth in item one of Plaintiff's exhibit 140.[4]

II. THE PARTIES[5]

1. Plaintiff has been a member of defendant Local 18, International

Union of Operating Engineers[6] since 1964. He is a resident of Orwell, Ohio and within the jurisdiction of District One of Local 18. Plaintiff has been associated with the "dissident movement" of Local 18 since 1970.

2. Defendant Local 18, 18A, 18B, 18C, 18G and 18RA[7] is a labor organization engaged in an industry affecting commerce within the context of 29 U.S.C. §402(i), and is a constituent division of the International Union of Operating Engineers.[8]

3a. Defendant John Possehl,[9] a member of the International since 1936, has been a member of Local 18 since 1940 when he was designated Assistant International Representative to Frank P. Converse, then International Representative, Business Manager, and President of Local 18.

b. Possehl has served Local 18 as Assistant Business Manager (1959-1967), President (1967-1971), and Business Manager (1967 to date). Possehl has also maintained his status with the International and is presently the Third Vice President of the International.

c. Possehl has additionally served in varying capacities with certain councils, committees, labor organizations, trusts and other entities with which Local 18 has been affiliated or has maintained a relationship.

d. Possehl has been a salaried employee of the International since 1940, and of Local 18 since at least 1959.

4a. Defendant Charles Rutherford[10/] served as President of Local 18 from 1971 until 1975.

b. At various times from 1948 through 1975, Rutherford has been a

salaried employee of Local 18, serving as Business Agent and as District Representative of District Three and as Special Representative of the Business Manager.

5a. Defendant John Frank[11/] has served as Vice President of Local 18 since 1971.

b. Frank has been a salaried employee of Local 18 since 1962, serving as Business Agent of District One from 1962 until 1968, and as District Representative of District Two from 1968 to date.

6a. Defendant Frank Miller[12/] has served as Conductor of Local 18 since 1971.

b. Miller has been a salaried employee of Local 18 since 1962, serving as Special Representative of the Business Manager.

7. Defendant S.A. Blair[13/] has served as Chairman of the Election Committee of Local 18 since 1971.

III. STRUCTURE OF LOCAL 18

A. JURISDICTION AND MEMBERSHIP

8. Local 18 has craft jurisdiction over stationary, hoisting, and portable operating engineers. Local 18 has territorial jurisdiction over 85 counties in Ohio and 4 counties in Kentucky.

9. There are approximately 16,000 members of Local 18.

B. ADMINISTRATION

10a. Local 18 is subdivided into the following working classifications for administrative purposes:

1. Local 18: journeymen who have belonged to the Local for four years or more; commonly referred to as the "parent local";

2. Local 18-A: apprentices

undergoing on-the-job training under the supervision of experienced operating engineers;

3. Local 18-B: new members who have joined the Local through the recruiting efforts of agents in the field,

4. Local 18-C: operating engineers engaged in shop or quarry activities;

5. Local 18-G: operating engineers employed in the public sector;

6. Local 18-RA: registered apprentices; differs from Local 18-A due to the requirements of formal classroom instruction in the operation of equipment in addition to on-the-job training.

b. Operating Engineers may only transfer between the above ratings by changing their book.

11a. Local 18 is divided into six administrative districts. Each district is responsible for the supervision of designated counties and operates out of a central office in performing its duties. The respective districts and

the cities in which their central offices are located are set forth below:

District 1.....Cleveland
District 2.....Toledo
District 3.....Columbus
District 4.....Dayton
District 5.....Cincinnati
District 6.....Akron

b. The central office in each district is under the direction of a District Representative, who is in turn assisted by Business Agents and a number of clerical personnel. District Representatives, Business Agents, and clerical employees are hired and salaried by, and serve at the discretion of, the Business Manager.

c. Pursuant to the numerous collective bargaining agreements to which Local 18 is a party, employment referral facilities are maintained in each central office through which contractors may request and obtain the services of opera-

ting engineers.[14/] Wage differentials and other employment conditions vary per district. Applicants for referral may register for employment in any district of Local 18, setting forth on their registration card the equipment they are qualified to operate. However, applicants are not permitted to register in more than one district at any given time. Nor are registrations accepted from applicants who are otherwise gainfully employed, or not immediately available for work. Applicants are registered in order of application, and classified in the following priority groups, commonly called "decks", for referral purposes:

> 1. Group A: applicants who have worked as operating engineers at least 120 days per year during each of the four preceeding years, and have been employed for at least twelve months during that four year period on work

defined and encompassed by the collective bargaining agreement of the requesting contractor;

2. Group B: is identical in all aspects with Group A, except that the twelve month period required under Group A is decreased to six months;

3. Group C: applicants who have worked as operating engineers at least sixty days per year during each of the two preceeding years;

4. Group D: applicants who have worked as operating engineers at least thirty days during the preceeding year;

5. Group E: all other applicants except apprentices;

6. Group F. all applicants who are apprentices;

7. Group G: all applicants who are temporary employees.

d. Contractor requests are processed by dispatchers in the central office. Applicants are referred in order of registration, beginning with "deck A" and progressing in succession through "deck E". Apprentices are referred in

order of their registration in "deck F".

e. When an applicant becomes employed, his name is removed from the deck as soon as he has worked a cumulative total of twelve days within the ninety day period following his registration for employment.15/

f. If an applicant is employed for less than twelve cumulative working days in said sixty day period, he is restored to his previous position in the deck when such employment terminates.

g. An applicant may not refuse referral to employment except for good cause, but, in any event, such refusals shall be limited to two consecutive refusals. An applicant who refuses a job referral for the second consecutive time loses his position in the deck, and his card is placed at the bottom of the deck.16/

h. Applicants must renew their registration with the central office every thirty days in order to maintain their place in the referral deck.

i. Contractors may request the referral of specific operating engineers by name, irrespective of deck position.

j. Local 18 is required to use its best efforts to notify applicants of available employment opportunities, but is not responsible for failure to locate an applicant.

C. OFFICERS, DELEGATES, BOARDS AND ELECTIONS

12a. Local 18 elects fourteen constitutional officers by majority vote of the entire membership. The respective offices and their responsibilities are discussed below.

1. BUSINESS MANAGER. The Business Manager directs and conducts all of

the business and affairs of Local 18.

His powers and responsibilities include, but are not limited to:

a. Negotiation and enforcement of all collective bargaining contracts;

b. Initiate, defend, or settle legal or administrative proceedings;

c. Employ professional and/or technical personnel,

d. Appoint or terminate any and all representatives, agents, assistants, or employees of Local 18;

e. Set the salaries of, and authorize the incurrence of expenses by, all representatives, agents, assistants, or employees of Local 18;

f. Act through any duly authorized and appointed deputy;

g. Manage all real and chattel property of Local 18;

h. Act as editor of the "Buckeye Engineer", the monthly magazine of Local 18;

i. Appoint the chairmen of the Election, By-laws and Referral

Committees, and; appoint the members of the Referral Committee;

j. Determine the number of delegates to the annual International Convention;

k. Appoint or remove delegates to all conventions, councils, organizations, or trusts, to which Local 18 is entitled to representation, except in those instances prohibited by law, the International Constitution, or the By-laws of Local 18;

l. Attend regular semi-annual meetings and district meetings.

2. PRESIDENT. The President is the presiding officer of Local 18. His duties include, but are not limited to:

a. Presiding at all meetings; determine questions of order therein subject to an appeal to the Local; cast the deciding vote in the event of a tie, and, determine the credentials of any member;

b. Enforce the Constitution, Laws, Rules, Ritual, and Customs of Local 18;

c. Authorize in conjunction with the Treasurer the disposition of

funds;

d. Appoint all committees unless otherwise provided for.

3. VICE PRESIDENT. The Vice President assists the President, fills the President's place in his absence, and performs such other duties customary to the office.

4. RECORDING-CORRESPONDING SECRETARY. The Recording-Corresponding Secretary maintains the records, minutes and correspondence of Local 18, and conducts any laison with the International regarding such records. The Recording-Corresponding Secretary is further responsible for various duties set forth in the International Constitution.

5. FINANCIAL SECRETARY. The financial Secretary receives all monies and funds paid to Local 18, delivers

such monies and funds to the Treasurer, and maintains records of such transactions.

6. TREASURER. The Treasurer receives all funds collected by the Financial Secretary, makes authorized disbursements, maintains records of such transactions, and reports the same to the Local when called upon to do so.

7. CONDUCTOR. The Conductor examines all members present at meetings and ascertains that such members are in good standing with the Local. The Conductor is further responsible for all initiation ceremonies.

8. GUARD. The Guard controls the doors at meetings and makes certain that none but members in good standing with the proper password enter, and that none retire without the consent of the

President.

9. TRUSTEES. There are three Trustees who supervise all funds and property of Local 18 under such instructions as they receive from the Local.

10. AUDITORS. There are three Auditors who audit the books and accounts of the Recording-Corresponding Secretary, Financial Secretary, and Treasurer, and any other fiscal officer or representative, and report the same to the membership when called upon to do so.

b. The first six constitutional officers are commonly referred to as the "line" officers. All of the constitutional officers serve without compensation for three year terms.

13. The line officers are by virtue of their offices delegates at large to the International Convention.

All other delegates and alternates to the International Convention are nominated at the district membership meetings in the month of December preceeding the convention, with the election being held by mail referendum in February.

14a. During those periods when the general membership of Local 18 is not in convention or in session the powers of the Local are vested in the Executive Board. The Executive Board is, therefore, the policy-making and administrative tribunal of the Local. All actions of the Executive Board are reviewable by the Local, but remain in full force and effect until revoked.

b. The Executive Board consists of the "line" officers, and of three elected members from each of the six districts of Local 18. Executive Board

members serve without compensation for a period of three years.

c. Prior to 1968 District Representatives and/or Business Agents were permitted to hold positions on the Executive Board. This practice was terminated by Fosachi in 1968.

15a. Just as the Executive Board operates by and for the Local membership between sessions, the respective Advisory Boards of each district are vested with the powers of the district membership between meetings. Additionally, the Advisory Boards conduct all pre-trial hearings of members charged with violations of Article XXII of the International Constitution.

b. Each Advisory Board consists of the District Representative, the Business Agents, and one District member

from each collective bargaining unit of Local 18. Advisory Board members serve without compensation for a period of three years.

16a. Candidates for the office of Business Manager must be qualified under the LMRDA and must have maintained their membership in Local 18 or its subdivisions for a period of three years preceding the election without being in default in the payment of dues for more than thirty days at any time during this period.

b. Candidates for any office other than Business Manager must meet the requirements set forth above, but only for a period of one year.

c. Prior to approximately 1971 only members of the parent local were eligible to be nominated as candidates

for Local 18 offices. Additionally, candidates were required to maintain continuous good standing as to the payments of dues, there bing no "grace" period provided at that time.

17. Vacancies in the constitutional offices, Executive Board, or Advisory Board are filled for the remainder of the unexpired term by majority vote of the "line" officers.

18a. In accordance with the By-laws of Local 18, the election of constitutional officers and Executive Board members is conducted by an Election Committee consisting of two elected members from each district plus the appointed chairman of the Business Manager. Election Committeemembers are nominated and elected by secret ballot in April of each election year. Officers and commit-

dates are precluded from serving on the Election Committee.

b. The Election Committee is empowered to employ the services of any person, firm, or organization to assist in conducting the election.

19. Nominations for the election of officers and Executive Board members takes place at the regular district meetings in June with the election being held by mail referendum in August. Candidates must formally accept their nominations through the office of Recording-Corresponding Secretary, and must thereafter be certified as bona fide candidates by the Election Committee.

20. The election of Advisory Board members is conducted concurrently with the election of constitutional officers and Executive Board members.

D. DISCIPLINARY PROCEEDINGS

21. Local 18 may discipline, fine, suspend or expel its members for violations of Article XXIII, International Constitution, and/or its By-laws. Pretrial and trial procedures regarding the prosecution of internal disciplinary actions are set forth in the International Constitution and the By-laws of Local 18.

22. Disciplinary actions are instituted through the filing of written charges with the Recording-Corresponding Secretary. Such charges must cite to the article, section, or rule alleged to have been violated and must be specific, stating clearly, concisely, and accurately the time, place, nature, and circumstances of the offense alleged. The Recording-Corresponding Secretary in turn notifies the defendant of the charges.

and the issues are joined upon the filing of the defendant's written answer.

23. Pretrial proceedings are conducted before the Advisory Board of the district in which the alleged offense is claimed to have occurred. Initially, the presiding officer of the pretrial attempts to assist the parties in settling their differences. If reconciliation is not achieved, the parties then present evidence in support of their respective positions and have the option of submitting the matter to the Advisory Board for final resolution or of having the Advisory Board determine if the charge is sufficient to require the defendant to stand trial. In either event, a majority vote of the Advisory Board is binding upon the parties.

24. Trials are conducted before

meetings of the general membership, or, upon certification of the Executive Board, before meetings of the district in which the alleged offense occurred.

b. The President of Local 18 serves as the presiding officer of the trial. The parties are represented by counsel of their choice, but such counsel must be members of the International. Although strict rules of evidence do not apply, hearsay evidence is not permitted.

c. At the beginning of trial, the presiding officer reads the pleadings to the parties, counsel, and the membership. Thereafter, evidence is presented by respective counsel. At the close of all evidence the pleadings are read to those present a final time. Following the final reading, counsel are permitted closing argument. After

argument, the presiding officer oversees the appointment of tellers; each party being entitled to appoint one teller, with a neutral teller being appointed by the presiding officer. The members then vote on the verdict by secret ballot. All members present, including the parties, counsel and the presiding officer, are entitled to vote. A vote of three-fourths of the membership recorded as present is required for conviction in cases involving the penalty of expulsion; a majority vote is required in cases involving lesser penalties. The vote is immediately tallied and the verdict announced accordingly. Upon a finding of guilty, the presiding officer immediately imposes the penalty permitted.

d. Appeals from the trial verdict may be perfected to the Interna-

tional.

E. MEETINGS

25. Meetings of the general membership of Local 18 are held in January and June of each year.[17] Such meetings are customarily held in Columbus, Ohio. When sitting as a body, the general membership exercises all power vested in Local 18. The President of Local 18 presides over meetings of the general membership.

26. District meetings are held in the respective districts on the second Monday of each month. When sitting as a body, the power of the district membership is restricted to:

> (a) Making recommendations to the Local or to the Executive Board;
>
> (b) Initiating legislation to the Local;
>
> (c) Electing members to the

Executive Board of the Local;

(d) Electing members to the district Advisory Board;

(e) Discussing work promotion projects, industry planning, and matters of general interest for the good and welfare of the Local;

(f) Holding trials of members within the district. Regular rules of order, including an order of business, for district meetings are set forth in the By-laws of Local 18. The District Representatives preside over meetings of the district memberships.

27. Advisory Board meetings are held on the first Monday of each month to, inter alia, review the agenda for the forthcoming district meeting.

29. Staff meetings of the Business Manager and District Representatives are held on a monthly basis.

IV. POLITICAL FACTIONS

30a. The incumbent officers of Local 18 and their supporters are known as the "hall group."

b. The members of Local 18 who publicly oppose the candidates and policies of the hall group are known as "rebels" or "dissidents."

31a. The candidates and policies of the hall group are promoted by the "Rank and File Committee", consisting of members recruited by the District Representatives and/or Business Agents of each district. Members of the Committee nominate the candidates endorsed by the hall group, raise funds for campaign purposes, and assist in organizing and conducting the campaigns of endorsed candidates.

b.

The rebels are an organized

confederation of members seeking certain changes in the structure and operation of Local 18. These changes include:

1. Election of Business Agents;

2. Improvement of member rights;

3. Improvement in the pension and welfare plan;

4. Stricter enforcement of collective bargaining contracts;

5. Stricter enforcement of safety rules.

c. Although the rebel movement is active in each district, its neucleus lies in District Two.

d. The rebel movement of Local 18 has been in existence since at least 1959. The core members of the movement have been the Shimman brothers, Walter, William, Jack and Ervin, of District Two. Over the years the movement has increased its activity and expanded into

other districts. By 1968, the Rebels had approximately 350 members in District Two alone, the membership being reflected in a roster maintained by rebel leaders. 18/ The dissident membership, however, has not remained static. In 1968 a major split occurred among the rebel movement. As a result of that split former dissidents, for example Ray Franxhouse and James McMahon, 19/ are now part of the hall group.

e. Both the dissidents and the hall group support their candidates and policies in organized campaigns. Both factions regularly meet to plan strategy prior to key state, district, and board meetings. Further, both factions promote fund-raising activities in order to acquire operating capital.

V. FINDINGS OF FACT

A. MEETINGS, INTIMIDATION AND VIOLENCE

32. Plaintiff became an operating engineer in 1964. From 1964 to 1969, plaintiff was not allied with the rebel movement. On the contrary, in 1965 plaintiff, at the behest of Frank, then Business Agent of District One, attended a rebel meeting in Mansfield, Ohio in a surreptitious capacity in order to report on rebel activity.[20/] During this period plaintiff also attended rank and file meetings at the direction of Frank.[21/]

33. Frank's antagonism toward the dissidents was demonstrated to plaintiff as early as 1965 at a District One meeting at which plaintiff unassumedly accepted some rebel literature being distributed. Frank, who had observed plaintiff taking the literature, immedia-

tely chastised plaintiff in the coarsest and most vulgar of language. In response, plaintiff immediately tore up the literature, drawing approval from Frank for such action.22/

34. In 1969, Frank was appointed District Representative of District Two by Possehl.

35. In early 1970, plaintiff began having altercations with the District One administration which eventually resulted in plainitff's entering the rebel faction. These altercations included:

a. A confrontation at April 13, 1970 District One meeting with Anthony Mangano, master mechanic, regarding Mangano's work habits and union loyalties.23/

b. Plaintiff was summoned to appear before the Advisory Board of District One on May 4, 1970 for conduct unbecoming an operating engineer.24/ The purported objectionable conduct of plaintiff consisted

of plainitff's dispute with Mangano, and plaintiff's having written a letter to Hunter Wharton, International President, alleging that "Bud" Converse had acted as presiding officer of the April 13, 1960 meeting while intoxicated. Plaintiff refused to appear before the Advisory Board.25/

c. On May 1, 1970 plaintiff, having failed to receive what he considered to be an adequate answer to his inquiries regarding the state of certain collective bargaining negotiations, picketed the District One offices for seven days.26/

36. From 1970 through May 8, 1972 plaintiff regularly attended District One membership and Advisory Board meetings, Executive Board meetings, and state meeting as a member of the dissident movement.27/

37. Insofar as District One membership meetings are concerned, plaintiff has been afforded ample opportunity to exercise his right to address the membership.28/ Although there is

testimony that plaintiff and other District One rebels have been denied the right to speak at district meetings, there is contradictory testimony of equal credibility that members of District One have neither been refused recognition by the chair, nor denied the right to speak upon being recognized.[29/] Further, the minutes of District One membership meetings reflect that plaintiff was permitted to address the membership during the course of business, and was generally treated in a courteous fashion by the chair.[30/] On certain occasions plaintiff actually thanked the chair for an orderly meeting.[31/] Plaintiff's right to speak at union meetings has not been abrogated, nor does it appear that other District One rebels have been denied the right to

speak at district meetings.[32/]

38a. Plaintiff has had greater difficulty in appearing before the Executive Board and the District One Advisory Board. In particular, plaintiff refers to the Executive Board meeting of June 27, 1970 at which those in attendance allegedly began clapping at Frank's signal whenever plaintiff attempted to speak. However, upon cross-examination plaintiff admitted that he came to the meeting late, was not certain of the business under discussion at the time of his arrival, immediately attempted to speak, and was "clapped down" as being out of order. Plaintiff further admits that he was permitted to speak at this meeting during the appropriate order of business.[33/]

b. In a similar fashion, plain-

tiff has only been denied the opportunity to address the Advisory Board of District One in those instances in which he attempted to address the board out of order, or discuss business not properly before the board.34/

c. Considering the evidence, it is concluded that plaintiff has not been denied the right to address these boards. 35/

39. The rebels of District Two have experienced much more difficulty in speaking at meetings than their counterparts in District One. The antagonism exhibited by Frank toward the District One dissidents in 1965, carried over and was equally apparent in District Two.

40. From 1971 until as recently as 1975 the meetings of District Two have been accented by the planned villi-

fication of rebels by members of the hall group. Through scatalogical verbal abuse Frank and his adherents[36/] disparaged and humiliated disfavored engineers before the district membership in an effort to intimidate and suppress any opposition to administration policies. The frequency and extreme nature of this villification, which took place not only on an individual basis in the union hall, but also at board and district meetings, refutes any inference that it was the result of mere political and/or ideological differences. It is clear that this verbal harassment was intended to be, and functioned as an instrument of control. Specific incidents of the tactic are discussed below.

a. District Two Advisory Board meeting, April 1971[37/]

1. Frank denounced Walter

Shimman and his family in extremely vulgar language.

2. Frank threatened to eject Walter Shimman from the meeting, and told Shimman not to call the hall in the future as he would not be serviced.

b. District Two meetings, June -- August, 1971.[38/] Frank called Glenn Oberle,[39/] who was running against Frank for the office of Vice President, a "commie", and declared to the membership that any engineer supporting Oberle would be thrown out or starved out of the union.

c. Election tally, District One offices, August, 1971.[40/] Frank denounced Oberle, and stated he would starve Oberle and the Shimman brothers out of the union.

d. District Two meeting, September, 1971.[41/] Frank stated that the dissidents had received too many votes.

e. District Two meeting, October, 1971.[42/] Frank villified Oberle in scatalogical language because Oberle had been selected as master mechanic by the Braun Construction Company. Frank subsequently reported this villification at the December 1971 District Two Advisory Board meeting.

f. District Two meeting, December, 1971.[43]/

1. Frank called Oberle a "fool" and stated that "these small minds must be destroyed."

2. James Grothaus, an Executive Board member, accused Oberle of incest; Frank, presiding officer, concurred in these comments.

3. Frank addressed Ervin Shimman in scatalogical language regarding Shimman's taking of notes during the meeting.

4. Frank stated to the membership that there is "too much democracy in Local 18", and that "the opposition would be destroyed."

5. Apprentices were told by Ray Frankhouse how to vote on certain issues. Those voting contrary to instructions were told by Frankhouse, State Apprentice Coordinator, not to ask for help from the hall. Shortly after this meeting, Frank commented that apprentices were tantamount to slaves and should not oppose the union or they could be hurt.[44]/

g. In January, 1972, Frank indicated to Oberle that Ken Delaney, an Executive Board member from District Two, would be asked to resign his position and would be "dressed down" at a district meeting to demonstrate to the members that Delaney had not complied with Frank's policies.[45]

h. District Two meeting, February, 1972.[46]

1. Frank stated that Bernard Kelly, a rebel in District One, was a thief and had molested small girls.

2. Frank described in crude and vulgar language an incident involving plaintiff at the February, 1972 election tally for international delegates. Frank further commented to the effect that plaintiff had set back the entire rebel movement, and that the opposition will be eliminated."

3. Frank declared that "a Shimman will never run this union."

i. District Two meeting, April 10, 1972.[47]

1. A vote of confidence for the Business Representatives[48] was placed before the

floor. At that time, Frank surrendered the chair to Robert Bowes, Business Agent, and strode among the members cursing and ordering the members to stand and show their support. Ultimately, all in attendance rose, with the exception of the four Shimman brothers.

2. Frank and Grothaus made further reference to Ervin Shimman's note taking.

j. District Two Advisory Board meeting, May, 1972.49/

1. Grothaus unsuccessfully attempted to grab Ervin Shimman's notes. Grothaus told Shimman in gross terms that someday he would get the notes.

2. Delaney crudely denounced an engineer seeking assistance from Frank in regard to a work rule violation. At this time Delaney was a member of the Executive Board, District Two Advisory Board, and the Rank and File Committee.

k. District Two Advisory Board meeting, September, 1972.50/

1. Frank villified Ray Rojek

Ervin Shimman in scatalogical language for having been elected to positions on the Advisory Board. Frank stated that those engineers who had voted for Shimman and Rojek would someday "crawl up the aisle on their bellies and ask [his] forgiveness."

2. Frank stated that Rojek, who had defeated Grothaus in the August, 1972 election, needed a "fist in the mouth and blood should flow in the streets."

3. Grothaus declared that anyone taking notes would not leave the meeting.

1. District Two meetings September, 1973 and August, 1975.[51] Frank denounced the rebels political efforts.

41. There is conflicting but equally credible testimony as to whether the rebels of District Three have been denied the right to speak at district meetings.[52] As there appears to be no preponderance of evidence with respect to this issue, plaintiff has failed to

carry his burden of proof in this regard.

42a. Dissident members have frequently sought to attend district meetings other than their own in an attempt to advance the rebel movement.

b. In June, 1970, a proposed collective bargaining agreement between Local 18 and the Building Contractor's Association was submitted for approval to the respective district memberships at special meetings held on successive evenings. At the District One special meeting on June 15, 1970 the membership refused to give approval to the proposed collective bargaining agreement. Plaintiff attended this meeting and attended a similar meeting in District Two the following evening. At the District Two meeting plaintiff attempted to speak in opposition to a statement by Rutherford

that all other districts had accepted the proposed collective bargaining agreement, but plaintiff was prohibited from speaking by Frank, presiding officer, on the grounds that he was not a member of District Two.[53]

c. In 1972, special district meetings were held in the same fashion as those of 1970 to conduct a membership referendum upon a proposed increase in the rate of member contributions to the Health and Welfare Fund and Pension Fund. Dissident members attempted to attend several of these meetings in order to oppose the increase.[54] At the District Four meeting the chair, Rutherford, ordered the rebels to leave the meeting.[55] On a subsequent evening at the District Five meeting the chair, Earl Erwin, overruled an objection by Rutherford and

permitted the rebels to attend and participate in the meeting.[56/] Finally, at the District Three meeting the chair, William Christian, upon motion carried, ordered the rebels to leave the meeting.[57/]

d. Possehl was present at the District Three meeting but expressed no view as to the propriety of the rebels exclusion.[58/]

43. In a drastic effort to compel the dissidents of Local 18 to submit to hall group practices, rebel members have been threatened and subjected to assault and physical violence.

44a. On June 27, 1970, plaintiff attended and spoke at an Executive Board meeting at the Sheraton Hotel, Columbus, Ohio. The Executive Board meeting ended at approximately 4:00 p.m. Thereafter,

plaintiff went to the bar at the Hotel's outdoor pool, ordered a drink, and sat down near the bar, propping his legs up on a small cocktail table. Near a table which was twelve to fifteen feet away from plaintiff was a group of Executive Board members and Business Agents; Grothaus, Delaney, Frank, Ben Iacampo, Roy Everett, Mike Kasper, and Harley Salisbury.59/

b. Shortly after plaintiff sat down, Grothaus called Delaney into a poolside room and the two men agreed to attack plaintiff. The men left the room and Grothaus walked over to plaintiff and knocked plaintiff to the ground. Grothaus and Delaney then proceeded to punch and kick plaintiff until the fight was broken up. Following the fight Grothaus told Delaney that they had "made

points" with Frank.[60]/

c. Plaintiff was taken to a Columbus hospital for treatment. Plaintiff did not attend the state meeting on June 21, 1970, but sought further medical treatment at the Cleveland Clinic.[61]/

d. At 2:00 a.m. on the morning following the poolside fight, Delaney and his wife were awakened in their hotel room by Ray Frankhouse and James McMahon, Business Agents of District Two, and told to immediately leave town to avoid arrest on criminal charges filed by plaintiff. Delaney immediately packed and left the hotel. Delaney did not pay his bill prior to leaving, nor at any time thereafter. Subsequently, Delaney unexplainedly received an extra $25.00 in his Executive Board expense check.[62]/

45a. Prior to the August, 1972 District Two Advisory Board meeting Frank, Grothaus, Delaney and others met and formulated a plan to obtain Ervin Shimman's notebook at the next Advisory Board meeting, September 5, 1972. The plan called for several members to huddle around Shimman in order to create a diversion, while one member grabbed Shimman's notes and left the meeting. Frank was to assist from the chair by calling for order and causing further distraction while the thief exited the meeting.63/ This plan was not executed on September 5, 1972. However, at the District Two meeting of September 11, 1972 Ervin Shimman's notes were stolen and Jack Shimman was severely beaten.64/

b. A change in the customary seating patterns of the hall group and

dissidents provided an indicia of the violence that was to occur at the September 11, 1972 meeting. As a rule the hall group occupied seats on the west side of the hall, and the dissidents sat on the east side. Ervin Shimman generally sat near a water fountain at the rear of the hall. However, on the evening of September 11 several members of the hall group including Grothaus and his son, Terry, sat among the rebel faction. The Grothauses were seated next to each other in the row behind Ervin Shimman, and to Shimman's left.65/ Delaney, who was sitting on the west side of the building, was asked by Lee Purty and Boyd Rader, members of the hall group, to join them among the dissidents. Upon refusing the invitation, Delaney was aksed if he was "chicken."66/

c. Toward the end of the meeting Ervin Shimman was addressing the chair, Frank, when Grothaus yelled and rushed at Shimman from the rear. Shimman naturally was taken by surprise and reacted by reflex in an apprehensive fashion. Grothaus, in a derisive fashion, asked Shimman if he was scared, and stated that he, Grothaus, was only going for a drink of water. Frank, in an equally mocking manner, inquired as to Shimman's fear, and then described Shimman's reaction to Grothaus' antics in crude and vulgar language. Frank's comments elicited chuckling from the membership, at which Ervin Shimman sat down and resumed taking notes of the proceedings.[67/]

d. Grothaus continued past Ervin Shimman and took a drink of water at the fountain. As he was returning to his

seat, Grothaus reached over Ervin Shimman's shoulder seized Shimman's notebook, and proceeded rapidly to his seat. As Grothaus was sitting down Jack Shimman, who was seated in the row behind Grothaus, attempted to reach over Grothaus' shoulder and recover his brother's notebook. Grothaus whirled to his left striking Jack Shimman in the solar plexus region with his arm. As Jack Shimman doubled over Terry Grothaus punched him, knocking him to the floor. Terry Grothaus then proceeded to kick Jack Shimman in the head several times as he lay on the floor.68/

e. During the commotion Grothaus passed Ervin Shimman's notebook to Philip Dawes, who concealed and subsequently burned the notebook.69/

46a. In December, 1971 following an

Executive Board meeting, Frank told Delaney "We got him first, but Columbus is going to get him next."[70] The meaning of Frank's statement became clear at the January 23, 1972 state meeting at the Veterans War Memorial Auditorium, Columbus, Ohio.[71]

b. Plaintiff arrived at the state meeting with several other District One dissidents at approximately 9:30 a.m., the meeting to begin at 10:00 a.m. The dissidents, including plaintiff, immediately began passing out campaign literature.[72] Plaintiff at that time was a candidate for delegate to the 1972 International Convention.[73]

c. As the rebels were distributing literature, Frank and several engineers arrived. Frank took some of the literature and immediately thereafter

one of the men with Frank returned to the rebels, requested and received additional copies of the literature, and promptly tore it up.[74]

d. At 9:45 a.m. Raymond Eugene Shell and A.J. Roberts, members of District Three,[75] came up the stairs and walked toward plaintiff. Simultaneously another engineer, Zachary Strong, approached plaintiff from a different direction, grabbing dissident literature, tearing it up, and shouting "lets get him." Shell walked directly to plaintiff and, while plaintiff was not looking, punched plaintiff in the head, knocking plaintiff unconscious, and stood over plaintiff threatening him.[76]

e. Plaintiff was revived and assisted by Gary Kershner and Bernard Kelly.[77] Shell entered the meeting

where he was greeted by Whitey Kemmerling, Business Agent and Executive Board member from District Three, who gave the salutation of "Hello muscleman" and raised Shell's hands over his head in the traditional sign of victory.78/

f. Plaintiff had never met Shell prior to January 23, 1972.79/ Shell admitted in a 1973 conference with plaintiff's then counsel, Eugene Svmms, that he had "nothing against [plaintiff]," but was "told to give plaintiff a hard time."80/

g. In late January, 1972, Frank told Oberle, in reference to Shell's assault upon plaintiff, "that's the way we ought to take care of the troublemakers."81/

B. LEGAL PROCEEDINGS

47. Several administrative, civil,

and criminal actions have been filed as a result of physical attacks on dissident members.[82]/

48a. Plaintiff filed an action against Local 18 with the National Labor Relations Board[83]/ alleging that Delaney and Grothaus had acted as agents and officials of Local 18 in attacking plaintiff at the Sheraton Hotel on June 27, 1970. This proceeding was dismissed on July 19, 1971 on the grounds that plaintiff had failed to prove an agency relationship regarding the incident.[84]/

b. Plaintiff also filed an independent civil action against Delaney and Grothaus with respect to the June 27, 1970 incident. Plaintiff's civil action was settled without necessity of trial in January, 1973.[85]/

49. Jack Shimman filed criminal

and civil actions in the United States District Court, Northern District of Ohio, Western Division, in regard to his beating of September 11, 1972. The criminal action was dismissed prior to trial. The civil action proceeded to trial without the intervention of a jury before the Honorable Don Young, with a verdict in favor of Jack Shimman being handed down by Judge Young on October 15, 1975.86/

50a. Plaintiff filed an action against Local 18 with the NLRB in regard to Raymond Shell's assault upon plaintiff on January 23, 1972. This action was dismissed on June 12, 1972 on the grounds that plaintiff had failed to prove an agency relationship concerning the incident.87/

b. Plaintiff also brought inde-

pendent civil and criminal actions against Shell with respect to the January 23, 1972 assault. On August 25, 1972, Shell was tried, convicted, and fined on the criminal charges. Plaintiff's civil action was settled without necessity of trial in August, 1973.88/

51a. Delaney was represented in plaintiff's civil action against him by attorneys Jeffrey Belkin, Cleveland, Ohio and Dwayne Callender, Toledo, Ohio.89/ Mr. Belkin's firm, Belkin, Belkin & Goldstein,90/ also represented Local 18 as general counsel.91/ Frank arranged counsel for Delaney.92/

b. Raymond Shell was represented in plaintiff's criminal action against him by attorneys Jeffrey Belkin and Alan Belkin.93/

52. Local 18 incurred substan-

tial legal expenses with respect to plaintiff's actions against Delaney and Shell.[94/] Possehl testified that he ordered Belkin, Belkin & Goldstein to "investigate" the potential liability of Local 18 in these lawsuits, and that expenses were incurred as a result of these "investigations."[95/] However, the services rendered by counsel pursuant to Possehl's orders greatly exceeds the scope of those services which would be expected in such an investigation. Moreover, Possehl's testimony must be considered along with that of Delaney,[96/] who testified that he paid the total sum of $1.00 to Mssrs. Belkin and Callender for their services. Considering this testimony and the extensive legal services billed to Local 18, it is clear that at Possehl's direction

counsel actively defended Delaney and Shell in their respective actions, and did not serve in a mere "investigatory" capacity.

C. ELECTIVE PROCESS

52a. The nomination of candidates for elective offices of Local 18 is co-ordinated on a state-wide basis by the rebels and the Rank and File Committee. Each organization endorses and promotes its respective slate of candidates, and arranges for the nomination of such slate in each district.

b. Plaintiff was a candidate for Trustee, the Executive Board, and the District One Advisory Board in the 1971 election of Local 18. Plaintiff was a candidate for Delegate to the International Convention in the 1972 election of Local 18.

c. The acknowledged practice of the chair of each district in accepting nominations is to recognize members of the Rank and File Committee before recornizing any dissident member seeking to nominate candidates.97/ As candidates for each office are listed on the ballot in order of nomination, this practice has polarized the ballot, with hall group candidates at the top of the ballot and rebel candidates at the bottom.98/ However, this practice has not given the hall group an advantage in the political process, as the electorate has distinguished between candidates and elected the candidate of their choice regardless of ballot position.99/

54. There has been testimony which indicates that certain irregularities in the nomination and election pro-

cess have taken place.100/ However, it appears that hall group members as well as rebel members have been equally affected by any irregularities. It has not been demonstrated that a conscious effort existed on the part of defendants to deny properly nominated dissidents their place on the ballot.101/

55a. Members of Local 18 other than administrative personnel do not have general access to the membership list of the Local.102/

b. During election years candidates may submit campaign literature to the District One office for mailing to the membership. The literature is reviewed for possible illegalities, mailed, and the postage is billed to the candidate. Candidates are not permitted to inspect the membership list, supervise

the mailing, or place a return address on the envelopes.103/

c. Candidates are permitted to inspect the membership list from 9:00 a.m. to 12:00 noon on the day preceeding the election tally in order to determine challenges to voter eligibility.104/ However, candidates are not allowed to copy any portion of the membership list.105/ Nor are candidates given access to the list at any other time for campaign purposes.106/

56. Elections are conducted by the Honest Ballot Association107/ under the auspices of the Election Committee. In each election a master control list of those operating engineers eligible to vote is prepared by the HBA from the membership records of Local 18. The master list is used to administer and

implement the mechanics of the elective process, and to monitor the accuracy of the election results. However, the HBA does not independently verify the accuracy of Local 18's records.108/

57. Dissident members successfully challenged the 1971 state officers election through the United States Department of Labor. The election was voided as a result of improprieties in the eligibility requirements for candidates, and re-run in 1972.

58. Since 1971 operating engineers have not been permitted to distribute any literature, political or otherwise on union property.109/

D. TRIAL, DISCIPLINE, REINSTATEMENT

59a. On May 8, 1972, plaintiff was tried before the membership of District One on charges stemming from a

disturbance he caused with respect to the February, 1972 election of delegates to the International Convention. The facts surrounding this disturbance have been thoroughly litigated before the NLRB and the United States Court of Appeals for the Sixth Circuit.[110/] The Court is therefore collaterally estopped from further considering the same facts insofar as they are relevant to the present action.[111/] The pertinent portions of the NLRB opinion are set forth below, additional findings of the Court follow thereafter.

Findings as to Murphy's Conduct During the Union Election

On February 12, 1972, Local 18 held an election for delegates to the forthcoming 1972 convention of the International Union of Operating Engineers. Murphy was a candidate for delegate from District No. 1 of Local 18.4/ [Local 18 has jurisdiction throughout the entire State of Ohio and for administrative purposes is divided into six districts.]

Some months before the date fixed for the election, the Union appointed an election committee of 12 members, the chairman of which was Stanley Blair. This committee was generally responsible for providing all eligible members an opportunity to vote in the election. Shortly after its formation the election committee retained the Hones Ballot Association (herein HBA) to oversee the preparation, mailing and tally of the ballots.

The Union spent approximately $10,000 on the conduct of this election among its over 11,000 members. An amount slightly in excess of $5,000 was paid to the HBA for its assistance and an almost identical total was spent on postage and clerical expense connected with the mailing of the ballots. George J. Abrams, Ececutive Director of the HBA and the official who was responsible for conducting the election and counting the ballots, testified at length as to the procedures which were

used to insure that the election was both fair and impartial.

Thus, Abrams testified that several weeks before February 12, he secured the Union's mailing list, met with its election committee, prepared the ballots, and mailed them out to the eligible members. Thereafter Abrams arranged for personnel at the HBA office in Cleveland to aid in counting the ballots on election day. According to Abrams, the most important document in the conduct of a secret ballot election is what he termed a "control list," the use of which is designed to forestall fraudulent voting and the use of counterfeit ballots. The control list for the Local 18 election was prepared by Abrams from the Union's records and contained the name and address of each member along with the control number assigned to that member by the HBA. This latter number was also placed on the outer envelope which the member used in mailing his marked ballot, and on which the member was required to place his signature. The staff of the HBA retained custody of the control list at all times and neither the union officials nor the candidates were allowed access to it.

On the day of the election, after Abrams and his assistants secured the ballots that had been mailed by the members to a special box at the post office, the HBA staff checked the outer envelope against the control list to make certain that the number on each

envelope corresponded with the number assigned to that particular member. Thereafter the outer envelope, bearing the member's signature, was removed and the inner enevelope containing the ballot was opened. According to Abrams, however, this was not done until all of the outer enevelopes, bearing the respective control numbers, were removed so as to maintain complete secrecy of the ballots.5/ [Before this step was reached the challenged ballots were segregated in the presence of the candidates and the election committe.] Abrams testified that after the above-described steps had been accomplished and before the actual tally of the ballots was begun, the control list was placed on a separate table in the front of the room. This was in an area which Stanley Blair, Chairman of the election committee announced to all present in the room would be off limits to everyone except Abrams and a member of his staff.

The incident in question occurred about 3 p.m. on the afternoon of the election and when the tally of the ballots was about half completed. Present in the room were Abrams and his assistants, Blair and his election committee, and several of the candidates along with their observers. Murphy was in the latter group.

According to Murphy, he had been there throughout the day and had become increasingly irritated because on the preceding day the election committee had

allowed him only 3 to 4 hours to examine the election list for the purpose of deciding on challenges. Since the list contained several thousand names and addresses he considered the time allotted hopelessly inadequate. Murphy testified that about the middle of the afternoon he spoke to Abrams about the matter of challenges and sought to examine the voting list, but that when he did so, the shouts and threats that arose caused him to run for his life. According to Murphy, he was pursued out of the union hall and finally apprehended in another building about a block from the election site. He testified that he did not realize until he reached the other building that he had the control list on his person.

Murphy's version of what occured was in conflict with that of Abrams. According to the latter, Murphy was not engaged in any discussion with him about challenges or anything else. Instead, according to Abrams, as he and his staff were busy with the tabulation and at about 3 p.m. he noticed Murphy step up to the table in the restricted area, take the control list and make off with it. Abrams testified that he immediately called out to Blair, chairman of the election committee, "Mr. Murphy is running off with the list." Thereupon, Abrams, Blair and several others began the pursuit of Murphy. One of the latter was Robert Bowes, a 61 year old business agent present at the election scene as an observer. During the first minute of the chase, when Bowes was

about to overtake Murphy, the latter turned and kicked him, knocking Bowes to the floor and breaking his glasses.[6/] [Murphy, many years younger than Bowes, is 6 feet and 4 inches in height. At the hearing, Murphy conceded that Bowes is about 6 inches shorter than he.] About 300 feet from the union hall and in an obvious attempt to evade his pursuers, Murphy entered the Hatton House Restaurant where he ran up to the second floor. On finding himself at a deadend and with Abrams and the union officials in hot pursuit, Murphy rid himself of the control list by sliding it under a locked door at the head of the stairs where he found himself at bay.

b. After plaintiff shoved the control list under the door of Hatton's Restaurant he lay flat on the floor of the landing in an attempt to escape detection. Plaintiff's efforts were unsuccessful, however, and as several engineers came up the landing stairs plaintiff rose and walked down the stairs toward them. Although plaintiff was threatened and jostled by his captors, he was not physically harmed during his

apprehension.[112]/

c. Officer Robert Butterfield,[113]/ Cleveland Police Department, Mounted Division, was patrolling in the vicinity of the District One office and was attracted by the cursing and commotion surrounding plaintiff's flight and capture. Butterfield arrived on the scene just as plaintiff was apprehended by his pursuers. Butterfield took charge of the situation, recovered the control list, and returned it to the Election Committee.[114]/

d. Blair and Rutherford demanded that plaintiff be arrested for stealing the control list. When Butterfield refused on the grounds that the list had no value, they insisted that he call his supervisor, Sergeant Michael Quinn. Butterfield complied, and Sergeant Quinn

arrived in his patrol car shortly thereafter.115/ At this time, Rutherford and Blair renewed their demands that plaintiff be arrested alleging that the election was invalidated and that it would cost thousands of dollars to reconstruct the list.116/ Consequently, Sargeant Quinn had plaintiff removed to the precinct police station and booked for petit larceny. Plaintiff was released when friends posted bond.117/

e. Shortly after plaintiff's release, Robert Bowes, Business Agent of District Two, and Leo Jankiewicz, the union hall janitor, filed assault and battery charges against plaintiff arising out of plaintiff's flight from the hall.118/ These charges were eventually dismissed for want of prosecution. 119/

f. On the following Monday, Rutherford and union counsel met with Assistant County Prosecutor Stewart Grendell and demanded that plaintiff be prosecuted for stealing the control list. Rutherford was quite adamant in his allegations that the list was "invaluable."120/ Prosecutor Grendell refused, and the charges were "nollied." 121/

g. During the election tabulation on the morning of February 12, 1972, Rutherford told Bernard Kelly, a District One rebel, in coarse terms "If I had plaintiff up on a plane, I would push him out without a parachute." 122/ Later that day, when informed that plaintiff had stolen the control list, Rutherford indicated that plaintiff's action did not matter as another

copy of the list existed.[123] However, it appears that Rutherford's reference to another list was not made with respect to a duplicate of the control list, but rather to certain membership lists separately compiled in order to cross-check the accuracy of the control list.[124] The testimony of George Abrams establishes that only a single control list existed for purposes of this election, and that the control list could not be reconstructed.

60. On February 14, 1972, Blair brought intro-union charges[125] against plaintiff alleging:

> William F. Murphy willfully attempted to disturb, interfere with and invalidate a duly called election for Delegates to the 1972 International Convention by forcefully taking the only master list, which reflected those eligible members who returned ballots, from the restricted

> polling area by carrying such list out of the Local 18 Headquarters and also by attempting to damage said list.

Blair specifically charged that plaintiff's actions violated: Article III, §3; Article XVI, §4; Article XXIII, Subdiv.(3), §(a); Article XXIII, Subdiv. (7), §(e) of the International Constitution, and Article V, §2; Article IX, §5 of the By-laws of Local 18.126/

61. Plaintiff filed his answer to Blair's charges on February 15, 1972. 127/ By letter of February 17, 1972, plaintiff requested permission to retain legal counsel in connection with all proceedings arising out of these charges. 128/ This request was denied, as the By-laws of Local 18 and the International Constitution provide that counsel for intra-union disciplinary proceedings

must be selected from within the membership of the International.129/

62a. Pursuant to the By-laws of Local 18, the charges against plaintiff came on for pretrial hearing before the District One Advisory Board on April 3, 1972.130/ The pretrial was presided over by Rutherford. Possehl, Bowes, Frank and Blair were also in attendance. 131/

b. In support of his charges, Blair elicited testimony from various engineers recounting the events of February 12, 1972.132/ In response, plaintiff asserted that he was not guilty and presented the Advisory Board with his written answer to the charges, but declined to adduce any evidence in defense of his actions. After deliberation, the Advisory Board found that sufficient

evidence existed to require plaintiff to stand trial before the membership of Local 18.133/

c. The Executive Board was informed of the decision of the District One Advisory Board at its April 8, 1972 meeting, and, upon motion unanimously carried, set plaintiff's trial for May 8, 1972 before the membership of District One.134/

63a. By letter of April 1972, plaintiff requested Rutherford to take thirteen precautionary measures in connection with his trial in order to ensure fairness.135/ In large part these measures were implemented at plaintiff's trial.136/

b. In a second letter of April 24, 1972, plaintiff requested permission to have his reply to Blair's charges

mailed to all members of District One. 137/ This request was denied.138/

64a. On the same evening as plaintiff's trial there were monthly membership meetings in every other district. The May 8, 1972 district meetings were unusually important to the membership because the provisions of a newly negotiated collective bargaining agreement were to be explained. As this agreement contained regional wage rate differentials, the explanation of the agreement was unique to each district. Consequently, the attendance at each district meeting was far heavier than usual.139/

b. Despite the importance of the May 8, 1972 district meetings, more than sixty engineers from outside District One attended plaintiff's trial. 140/ Thirty of these engineers were

from District Two; twenty were from District Three.[141] Many of the engineers in attendance from outside District One were state and/or district officials.[142]

c. Delaney testified that he attended the trial and voted to convict plaintiff at Frank's direction. Delaney further testified that he attended the trial with Elmore Solomon, who was under similar instructions from Frank.[143]

d. Defendants offered no testimony explaining why engineers and officials would miss an important meeting in their home districts in order to attend plaintiff's trial in District One.[144]

e. The foregoing evidence leads to the inference that the composition of plaintiff's jury was manipulated in such a fashion as to ensure plaintiff's conviction. This inference is drawn and

it is concluded that this manipulation denied plaintiff an impartial jury of his peers.

65a. Plaintiff's trial was held at the regular District One meeting, May 8, 1972. Plaintiff was represented by Bernard Kelly, a fellow dissident from District One. Blair was represented by Miller, and Frank. Rutherford, as President of Local 18, presided over plaintiff's motion that he recuse himself on the basis of prejudice.[145/]

b. Plaintiff's trial proceeded in an orderly manner with the respective parties presenting testimony as to the events of February 12, 1972. Additionally, the prosecution offered into evidence a letter from George Abrams recounting his version of plaintiff's actions and the potential consequences

thereof.[146] This letter was admitted into evidence over the objection of plaintiff's counsel.[147]

c. Plaintiff contends that he was unduly prejudiced by inflammatory, irrelevant, and disparaging comments made during the course of trial by counsel for the prosecution and the chair. However, plaintiff's trial was not subject to the strict procedural, evidentiary, and due process requirements which are incumbent upon a court of law. Considering the entire record of the trial, plaintiff was not unduly prejudiced by impermissible misconduct on the part of Miller, Frank or Rutherford.[148]

d. At the conclusion of trial plaintiff moved to verify the eligibility of those engineers seeking to vote by having the dues payment records of each

engineer checked as he cast his ballot. Rutherford denied plaintiff's motion.149/

e. Respective counsel, the presiding officer, witnesses and the parties were permitted to vote as part of the jury in plaintiff's trial.150/

f. A total of 496 votes were cast, 262 for conviction, 225 for acquittal, and 9 abstentions. A majority of the vote having been cast for conviction, Rutherford declared plaintiff to be guilty as charged, imposed a fine of $500 upon plaintiff and suspended plaintiff from membership in Local 18 for a period of two years.151/

66a. Upon plaintiff's suspension, Possehl ordered plaintiff's referral registration card to be placed in the inactive file.152/ At that time plaintiff's card had been in the deck since

November 23, 1971.[153] Possehl had plaintiff's card removed from the deck in order to punish plaintiff for the theft of the control list, and for certain additional altercations in which plaintiff had been involved.[154] Possehl's order was conveyed to the District One dispatcher, Shirley Hacker, by Rutherford and Frank Roviscaine, District Representative of District One.[155]

b. Shortly after his trial, plaintiff attempted to re-register his card in order to preserve his November 23, 1971 referral date. However, plaintiff was not permitted to re-register, but was informed by Hacker, pursuant to Possehl's order, that he would have to fill out a new registration card. By filling out a new card plaintiff would

go to the bottom of the deck for purposes of referral.[156] Plaintiff did not receive advanced notice that his card would be placed in the inactive file and that he would have to re-register in the deck.[157]

c. Plaintiff refused to register anew and instead filed charges with the NLRB.[158] In August, 1972, plaintiff's card was returned to the referral deck under its original date of November 23, 1971.[159] Local 18's refusal to permit plaintiff to re-register for this three month period was subsequently upheld by the United States Court of Appeals for the Sixth Circuit.[160]

67a. In anticipation of the end of his suspension, plaintiff requested reinstatement forms from Earl Erwin, Recording-Corresponding Secretary, by

letter of March 30, 1974[161] the submission of such forms being a condition precedent to reinstatement under the International Constitution.[162]

b. On April 6, 1974, the Executive Board, pursuant to Possehl's recommendation, voted to refuse plaintiff reinstatement because plaintiff currently had pending four legal actions against Local 18.[163] Plaintiff was not notified in advance that the Executive Board countemplated taking such action, nor was plaintiff promptly informed of the Executive Board's refusal to reinstate him.[164]

c. By letter of May 21, 1974 to Ray Stephens, Financial Secretary, plaintiff tendered his check in the amount of $60 for past dues, assessments and fees in connection with his reinstatement.[165]

Stephens responded on June 3, 1974, by returning plaintiff's check and referring plaintiff to Possehl's letter of April 11, 1974 concerning the proper procedure for reinstatement.166/ Plaintiff immediately wrote to Stephens stating that he had not received any letter from Possehl regarding reinstatement, and requesting a copy of the referred to letter of April 11, 1974.167/ Stephens mailed plaintiff a copy of Possehl's letter on June 10, 1974.168/

d. Possehl's letter of April 11, 1974 requested plaintiff to appear in person at the District One offices in order to obtain the requested reinstatement forms. The letter did not refer to the April 6, 1974 action of the Executive Board refusing plaintiff reinstatement.169/

e. The Executive Board's action of April 6, 1974 effectively expelled plaintiff from Local 18. However, charges were never preferred against plaintiff, nor was plaintiff ever brought to trial and convicted by a three-fourths vote of the membership as required by the By-laws for the penalty of expulsion.[170] The action of the Executive Board was completely unilateral.[171]

f. By order of this Court, plaintiff was restored to membership in Local 18 on June 5, 1975.

E. THE "WORKING TELEPHONE NUMBER" REQUIREMENT

68a. Article X, §1 of the By-laws of Local 18 provides that an applicant for referral to employment must provide his "name, address and a working telephone number through which [he] can be reached."[172]

b. From 1971 through 1973 plaintiff had no permanent residence, and therefore retained an answering service in order to receive referrals.[173] This practice proved unacceptable, however, as plaintiff repeatedly failed to respond to referral calls from District One.[174] In this regard, numerous instances were documented of plaintiff's failure to promptly return referral calls.[175] On two separate occasions plaintiff assured his District Representative that he would be available for referral through the answering service, and thereafter failed to live up to these representations.[176] Further, plaintiff admitted on cross-examination that he frequently did not answer referral calls for three or four day intervals, even though he was aware that in the vast majority of referrals

contractors require the services of the dispatched engineer on an immediate basis.177/ Eventually, plaintiff was informed by District One officials that he would not be permitted to register in the referral system until he complied with the requirements of Article X, §1. 178/ Plaintiff's registration card was placed in the inactive file on September 1, 1973 and plaintiff has not worked as an operating engineer since that date. 179/

c. The decision to not allow plaintiff to register until he furnished District One with a "working telephone number" was made by Possehl.180/

F. THE REFERRAL SYSTEM

69. The only written description of the referral system available to members is that which is set forth in

the collective bargaining agreements entered into between Local 18 and respective contractors. A description of the system is posted in the district offices. 181/

70. The referral system is intended to operate in a uniform fashion throughout the Local. However any uniformity is confined to the mechanical function of dispatching engineers to employment. As will be discussed more fully, the actual operation of the referral system is very subjective in nature.

> a. There are no written guidelines or policies distributed to district dispatchers concerning the operation of the referral system. All referral policy is established at staff meetings between the Business Manager, District Representatives, and Business Agents. Policy decisions are thereafter communicated to the district dispatchers. These

staff meetings are held at least six times a year.182/

b. The two-refusal rule has had divergent interpretation among the districts.

1. In District One Steve Mayor, District Representative, established a special preference permitting "local engineers" to work on the Perry Power Plant project and excusing non-local engineers from the effect of the two-refusal rule as to that project.183/

2. In District Four an engineer is not subject to the two-refusal rule if a job is considered too far from his home. Whether the job is "too far" is determined by the engineer to be dispatched.184/

3. In District Three, the determination as to whether a member is excused from the two-refusal rule because of excessive distance to a job is made by the District Representative or Business Agents on a case-by-case basis.185/

4. District Two promulgated a "50 mile rule" which

provided that an engineer's refusal to accept employment more than 50 miles from his home would not be counted against him for purposes of the two-refusal rule.186/

5. In District One, distance to a job is normally only one factor considered in determining whether an engineer is to be excused from the operation of the two-refusal rule.187/

c. District Two members unilaterally modified the provisions of the referral system within their district by providing that less strenuous jobs would be reserved for older engineers.188/ This practice is unknown in other districts.189/

d. A union member who becomes ill or unable to work while on a job may request a temporary replacement from the hiring hall. Absent an extended illness on the part of the engineer originally dispatched, such relief time is not considered in determining whether the replacement engineer has worked 12 days in the last 90 day period. However, there are no formal guidelines as to when relief time will be converted into a referral for

purposes of the 12 day requirement.190/

e. Operating engineers are dispatched in accordance with their place in the deck and the equipment they are qualified to run. However, the only resources available to the dispatchers in evaluating the equipment qualifications of an engineer are the engineer's work record and the equipment listed by the engineer on his registration card. Further, the dispatchers are not experts in heavy construction equipment, and must frequently refer to the District Representatives and Business Agents in determining the ability of an engineer. There is no uniform system by which engineers are rated as qualified to operate certain pieces of equipment. 191/

f. Although the referral of engineers is supposed to be done exclusively by the dispatchers, District Representatives and Business Agents are regularly and substantially involved in the referral process. 192/

71a. The official policy of the United States Department of Labor con-

cerning the right of members to inspect the deck in order to determine their referral status in comparison to other engineers is reflected in entry 110.320 of the LMRDA Interpretive Manual, which provides:193/

> All supplements which are incorporated by reference into a collective bargaining agreement become a part of it. Thus, where an agreement makes reference to a work referral system which the union is to administer, and further sets up terms, conditions and classifications of employees which the union is obliged to follow in referring applicants for jobs, the referral list is incorporated by reference into the basic agreement. Therefore, being a part of the basic working agreement, the referral list should be made available pursuant to section 104.

There is contradictory testimony however, as to Local 18's policy in this regard.

b. Possehl testified that so long as an engineer's request is reason-

able and time permits he is entitled to inspect the deck and ascertain not only his position, but also those engineers of comparable skills who are before and after him in the deck. Possehl further testified that he has instructed the District Representatives in this regard at staff meetings.

c. Steve Mayor, Paul Knott, Clifford Farwell and Walter Linder, District Representatives of Districts One, Four, Five and Six, respectively, testified that Possehl's instructions are complied with in their districts. They further testified that the deck is generally available to members for inspection after district meetings, and that members can also inquire of the administrative staff during the day insofar as the press of business allows. Frequent-

ly, time constraints of the business day preclude a member's detailed inspection of the deck, in which case the engineer is given his approximate referral position.

d. William Christian, District Representative of District Three testified that members are permitted to see their place in the deck, but are not allowed to see the place of other engineers. As in the other districts, engineers are given an approximate referral position when time constraints preclude inspection of the deck.

e. Robert Shook, and Wesley Johnson, engineers from District Two, testified that they have inquired at the hall as to their position in the deck, the number of engineers of equal qualification ahead of them, and have been answered in each instance. Shook fur-

ther testified, however, that he did not know if dissident members received the same courtesy from the hall.

f. Steve Wood and James Irwin, engineers from District Five testified that they have exercised their right to determine their place in the deck in reference to other engineers. Wood and Irwin further testified that the Business Agents have assisted them in inspecting the deck.

g. Edward Duncan, an engineer from District Four, testified that upon inquiring about employment status he has always been told the number of engineers in the deck, the number of engineers in the deck with skills comparable to his own, and his place in the deck.

h. Dissident members of Districts One, Two and Three testified that

they are denied the right to inspect the deck in their respective districts.194/

i. Thomas Jesse Preston testified that District Three members are not permitted to inspect the referral deck. However, in view of the settled policy in District Three that no member may inspect the deck, dissident or otherwise, the rebels are not treated any differently than the district membership as a whole.

j. Ervin Shimman testified that as recently as March 16, 1976, during the trial of this case, he was denied the right to inspect the District Two referral deck by James McMahon, Business Agent, and was told that the "policy of Local 18 is not to see those ahead or behind you in the deck.195/

k. Plaintiff testified that

on numerous occasions he has attempted to ascertain his position in the referral deck in reference to that of other engineers, but in each instance has received only an approximation as to his place in the deck.196/ Betty Finley, dispatcher, also testified that plaintiff was always given an approximation of his place in the deck, and was never permitted to inspect the deck. However, any refusal to give plaintiff access to the deck by District One administrative personnel must be considered in light of plaintiff's conduct at the hiring hall. Plaintiff's conduct in this regard was considered by the NLRB along with the matter of plaintiff's theft of the election list. For the reasons previously set forth the Court is collaterally estopped from further consideration of

the facts determined by the NLRB.[197/] The pertinent portions of the NLRB opinion are set forth below; additional findings of the Court follow thereafter.

Findings as to Murphy's Conduct at the Hiring Hall

> At the time in question the Respondent's referral office was located on the second floor of the Union Hall. It was a large room that was separated by a partition which extended from the floor to about 3 feet from the ceiling. The clerical staff that was responsible for the operation of the referral service was on one side of the partition and the union members gathered on the other side where chairs were located and where they awaited their turn in soliciting employment assistance. At one section of the partition there was a window and counter to which the members reported for any union business they wished to transact. Until the early part of 1971 this window had a large, unrestricted opening. Thereafter, for reasons which will appear below, an iron grille was placed across it. Next to the window there was a door which enabled office personnel to enter the office area. The bottom of this

door had glass louvres.

Shirley Hacker, the principal dispatcher, was assisted by Betty Finley, the assistant dispatcher, and employee Pamela Coates, in maintaining the referral list for the hiring hall, taking employment requests from contractors and securing men to fill such jobs. Hacker had been the dispatcher since 1969 and Finley the assistant dispatcher since 1968. Both Hacker and Finley testified at length as to Murphy's behavior in his contacts with the referral office during the period from 1970 to 1972. From this testimony it is evident that whenever Murphy visited this office and was not immediately referred to a job, he thereafter made many more visits that same day and in succeeding weeks. At the same time, and during this period, he made dozens of calls to Mrs. Hacker, Mrs. Finley, or anyone else in the office who would answer the telephone.

Hacker testified that on many occasions, after Murphy appeared at the window and was told no job was to be had, he went immediately to a pay telephone on the first floor of the building and from there called to ask whether, during the ensuing minutes, a job had become available. She testified

that whenever she reported that she was still unable to refer him to a job he would become abusive and curse her. On one such occasion when he called her a "God damned bitch" she hung up on him. Almost at once Murphy appeared in the waiting room and shouted at her through the window "Do you make it a practice to hang up on members?"

According to Hacker, when Murphy came to the referral office and found that the Union had no job opening for him he would deride her and the other office personnel with abuse and profanity. When any of the business agents were present in the office he criticized them for not being at work in the field and when none of them was present he would rail at the system and complain that no business agent was available to hear his demands.

Hacker testified that in 1970 Murphy often stood at the window and, by reaching over the counter, secured some of their records which he insisted on perusing. According to Hacker, in order to prevent Murphy from continuing this practice, in 1971 an iron grille was installed at the window. Hacker testified that thereafter Murphy often came to the office and stood at the window, where he would remain,

silently staring at the girls working in the office, sometimes for as much as 20 minutes. At other times he would place a chair against the partition and then stand on it, peering over the wall at the office personnel without speaking, for 10 to 20 minutes at a time. On other occasions he subjected them to the same type of treatment by laying on his stomach in front of the door to their work area from which vantage point he gazed up at them through the louvre openings. Mrs. Finley corroborated Hacker's testimony as to these incidents and testified that she found it nerve-wracking and upsetting to look up from her work and discover that Murphy was staring at her through the louvres at the bottom of the door. Both Hacker and Finley testified that they frequently complained about Murphy's practices to Business Agent Frank Roviscane who admonished the member about this conduct, but that Murphy persisted in this type of behavior until the time of his suspension.

Hacker testified that several times when she was explaining the referral system to a nonmember, Murphy appeared at the window. According to Hacker, when this occurred, Murphy would interrupt her conversation make desparaging remarks about the manner in which

Local 18 operated the referral system, tell the nonmember that there was no use registering and declare that the referral list might as well be posted in the men's washroom next to the toilet paper.

Murphy conceded that during the period in question he came to the referral office several times a week, that he occasionally stood on a chair to look over the partition at the girls in the office, and that after leaving he sometimes telephoned the girls at the hiring hall as often as 12 times a day. He further acknowledged that if the switchboard operator put him on hold while he was making a call from the pay telephone on the first floor of the building, he immediately went back upstairs to the referral office. Murphy denied that he ever cursed the office workers, that he ever lay on his stomach and peered at the girls through the louvres on the office door, or that he ever stood at the counter window and stared for extended periods of time at Hacker, Finley, and the others at work there. Murphy's denials, however, were not credible. Hacker and Finley were completely frank and forthright in their testimony as to the antics in which Murphy engaged over a long period of time. Their testimony carried a persuasive ring of conviction and was entirely convincing. In view

of this conclusion, the undersigned finds that insofar as Murphy's testimony differs from their account, the testimony of Hacker and Finley is the more accurate as to what occurred at the Union's hiring hall during Murphy's visitations and his telephone calls.

1. Although plaintiff has testified that he has been denied access to the District One referral deck, any such denial must be attributed to plaintiff's conduct at the hiring hall. Plaintiff's antics repeatedly disturbed the daily business activity of the hall.[198/] Plaintiff's requests to see the deck cannot be considered to have been "reasonable" when made under such disruptive conditions. Further, no evidence has been adduced that plaintiff ever attempted to inspect the deck after District One meetings which is the normal policy in this regard.[199/] Finally, from

September, 1973 to date plaintiff has not even been registered in the deck.

m. The evidence establishes that the dissidents of District Two, and the membership of District Three have been denied access to their district referral decks. However, plaintiff has failed to prove by the requisite quantum of evidence that he has been denied the opportunity to inspect the referral deck for any reason other than his own misbehavior.

72. The inherent subjectivity of the referral system has enabled the members of the incumbent administration to manipulate employment referrals in such a fashion as to benefit supporters and punish dissenters. This manipulations has been evidenced by the operation of the referral itself, and by the state-

ments of various members of Local 18's Administration.

73. Gary Kershner served on the Delinquent Loans Committee of the Local 18 Credit Union from 1969 to 1972. Eventually, Kershner was appointed Chairman of the Committee. As Chairman, Kershner had access to the work records of Local 18 for use in determining whether debtor engineers were able to repay outstanding delinquent loans. Kershner discovered that some engineers had been out of work for as long as seven months at a time, while other engineers of comparable skills had been referred to work within a three week period. Kershner brought this discrepancy to the attention of Frank Roviscane, District Representative of District One. Roviscane told Kershner "take care of your business at the

credit union and I'll take care of things down in my office."200/

74a. John Barnes, Administrator of the Ohio Operating Engineers Health and Welfare Plan, testified that the average engineer works between 1200 to 1400 hours annually.201/ Premised upon an 8 hour day, this annual hourly figure reflects an average of 150 to 175 days worked per year. Naturally, these figures represent an "average" and would vary when analyzing specific engineers due to such variables as experience, equipment qualifications, requests, overtime, and general economic conditions.

b. From 1964 through 1969 plaintiff averaged in excess of 200 days worked per year.202/ From 1970 through 1973 plaintiff averaged less than 100 days worked per year.203/ The Court

is mindful that the decline in plaintiff's average annual employment is due in part to disciplinary measures imposed upon plaintiff, and plaintiff's refusal to furnish District One with a "working phone number." Nonetheless, the fact that plaintiff experienced a drastic reduction in his average annual employment coterminously with the beginning of plaintiff's dissident activity is beyond mere coincidence. This is especially true in view of the above average annual employment compiled by plaintiff during his early years as an engineer, when all variables would normally have operated to keep him below average. The evidence establishes that plaintiff enjoyed preferential employment opportunities during those early years in which plaintiff was a member of the hall group, and that this

preference was promptly terminated at the onset of plaintiff's dissident activity. 204/

75. On December 5, 1975, Gary Kershner was referred by the District One dispatcher to a one-day job commencing December 8, 1975.205 Kershner, however, suffered an injury prior to beginning the job and was forced to request a relief replacement from the hall. Despite the fact that Kershner was necessarily at the very top of the referral list, he was not referred to another job until February 9, 1976.206/ Kershner is qualified as a master mechanic, capable of operating any equipment in the craft.207/ Further, Kershner's work record and testimony demonstrates that he readily accepts short-term employment on any equipment.208/ To conclude that

Kershner was properly unemployed for this interval, would require that Court to infer that District One did not receive a single referral order during this period. Although mindful of the seasonal nature of the trade, the Court declines to draw such an inference.209/

76. In 1972, Frank Roviscane, District Representative of District One, telephoned Frank Hurd, a District One rebel, and solicited Hurd's support for a proposed increase in contributions to the Health and Welfare Funds. When Hurd expressed his opposition to such an increase, Roviscane replied that only "the people that supported the organization's way of thinking are the one's who would work."210/

77. Glen Brinker, an engineer from District One, was transferred211/

by Ben Iacampo, Business Agent, from a cherry picker to a tower crane while working on the Justice Center Project, Cleveland, Ohio.212/

78. Bernard Kelly, a dissident from District One, was bypassed in the referral system in favor of engineers of comparable skills who had registered in the deck after Kelly.213/

79. Business Representatives of District One have manipulated the referral system in order to refer relatives to employment ahead of more experienced, better qualified engineers. 214/

80. There has been conflicting testimony as to whether Local 18 will refer an engineer to employment by leaving a message with the engineer's family.215/ Plaintiff has contended

that hall group members are referred in this fashion but that dissidents are not afforded the same courtesy. The evidence adduced by the parties in this regard, however, has been of equal weight and credibility. Accordingly, plaintiff has failed to carry his burden of proof as to this contention.

81a. In mid-1970 Ervin Shimman had been requested by and was working for the McDowell-Wellman Construction Company. During this period Frank asked Shimman to run for the District Two Advisory Board on the rank and file slate. When Shimman refused, Frank replied that Shimman was on the McDowell-Wellman job illegally and would be removed the next day. Shimman avoided removal by having the contractor formally request him in a letter to the District Two hiring hall.

216/

b. In 1971, Ervin Shimman was elected by the District Two membership to the Executive Board of Local 18. At an Executive Board meeting in early 1971, Frank told Shimman that if he did not oppose administration policies he would receive preferential employment treatment, but if he did not conform to such policies he would be sanctioned through the referral system.217/ Shimman replied that he would vote for the members of District Two.

c. In March, 1971 Ervin Shimman concluded service as master mechanic on the Davis-Besse Power House project. A short time prior to the completion of this job, Shimman had laid off Woody Caulder, a District Two engineer. When Shimman went to the hiring hall to re-

gister for employment, however, he discovered that despite the fact that 200 engineers were registered in the deck Caulder had been immediately referred to another job by Robert Bowes, Business Agent. The job Caulder had been referred to was projected at 1 1/2 years duration. Shimman confronted Frank and Bowes concerning Caulder's referral and succeeded in having Caulder removed from the job. 218/

d. 1. On March 19, 1971, subsequent to the above incident, Ervin Shimman was telephoned at home by Superintendent Twitchell of the Catalytic Construction Company. Twitchell inquired as to Shimman's availability for work on upcoming Standard Oil project. Shimman told Twitchell that he was available, but could not work unless properly re-

quested through the hiring hall. Twitchell assured Shimman that the request would be placed with the hall.219/

2. A short time thereafter Frank telephone Shimman and informed him that he had been requested by the Catalytic Construction Company, but would not be dispatched because "you are going to make a lot of money in a job like that and I got somebody picked out." After further discussion Shimman hung up, called Twitchell and explained what had taken place. Twitchell told Shimman that he would deal with the problem.220/

3. Twitchell immediately had Shimman formally requested by way of a telegram from A.H. Muller, Catalytic Labor Relations Representative, to the District Two hiring hall. Later that day the dispatcher telephoned Shimman and

told him to report to the Catalytic job. Shimman asked to speak to Frank to verify the request and learned of the telegram. Frank was openly irritated by the request and told Shimman "you go out there, but I'll get you yet."221/

e. 1. On October 14, 1971, Ervin Shimman refused a referral to a hoist job. This was Shimman's second refusal and resulted in his card being returned to the bottom of the deck.222/ Later that evening Frank telephone Shimman and informed him that he had been requested by the Braun Construction Company. Frank told Shimman, however, that he would not be referred to the Braun project because he was subject to "special" referral rules and his registration card was being "frozen" at the bottom of the deck for a period of 10 days Frank

proceeded to tell Shimman "Phase 1 is when I come in here and Phase 2 is when I come in here I found enemies; and you are one of my enemies and I am going to destroy my enemies"; and, "I'm the hatchet man from Cleveland. I come in here to chop heads and you are one of the heads I come in here to chop." Finally, Frank told Shimman "I will starve you out. I will destroy you."223/

2. Shimman protested Franks actions to Possehl, who in turn ordered Frank to refer Shimman to the Braun project. Frank complied with Possehl's order, but in doing so told Shimman "I'll get you yet."224/

f. 1. Sometime prior to April, 1975, Ervin Shimman underwent spinal surgery. As a result of this surgery Shimman convalesced for a period of

eight months, and was ordered by his doctors to refrain from operating long-boom equipment for a period of 1 1/2 years. Consequently, Shimman informed the hiring hall of his temporary inability to accept referrals involving long-boom equipment.225/

2. In April, 1975 Robert Bowes, Business Agent, telephoned Shimman regarding a referral to a long-boom crane in Green Springs, Ohio. Shimman reiterated to Bowes that he was unable to operate such equipment at this time. Bowes replied that if Shimman's refused the job it would constitute his second refusal and his card would be placed at the bottom of the deck. Shimman, in financial straits at the time, accepted the referral.226/

82a. In the 1971 state-wide elec-

tion Oberle ran for Vice President on the dissident slate against Frank. At the District Two meetings between June and August, 1971, Frank declared that any engineers supporting Oberle would be "starved out of the union."227/

b. 1. On October 5, 1971 Oberle was telephoned by Tillie Kershner, District Two dispatcher, and told to report to the Braun Construction Company to be interviewed for the position of master mechanic on an upcoming project. Oberle went to the interview and was informed that he would be notified as to the Company's choice for the position.228/

2. On October 7, 1971 superintendent Stageman, Braun Construction Company, called Oberle and told him that he had been selected for the master mechanic position. Stageman further

told Oberle that when Frank had been informed of this decision he had become quite irate and had spoken of Oberle in a very derrogatory manner.229/

3. On November 5, 1971 Frank called Oberle and offered him a referral requiring the operation of a forklift. Oberle informed Frank that he had told the dispatcher not to call him until the question of the Braun master mechanic had been resolved. Frank replied that since Oberle had not personally asked him for permission to temporarily withdraw from the referral, Oberle's registration card would be returned to the bottom of the deck. When Oberle protested Frank told him to address any grievance to Possehl or Rutherford. Oberle did attempt to contact Possehl and/or Rutherford but was unsuccessful.230/

4. On November 23, 1971, the master menhanic issue remaining unresolved, Superintendent Stageman telephoned Oberle and asked him if he would accept an interim referral to a cherry picker on the Braun job. Oberle replied in the affirmative and Stageman said he would place the request with the hall. However, shortly thereafter Stageman again called Oberle and informed him that Frank had refused to honor the request. Oberle, understandably upset, again attempted to contact Possehl and/or Rutherford in Cleveland. Neither man was in the District One offices, but Oberle did leave a message with Rutherford's secretary. Oberle, however, was never contacted by Rutherford or any other official of Local 18.231/

5. Unable to obtain an ex-

planation or satisfaction from any source, on November 26, 1971 Oberle filed a grievance with the Local over Frank's refusal to honor the Braun requests.232/

6. At the December 13, 1971 District Two meeting, Frank read Oberle's grievance to the membership and denounced Oberle as a communist and an enemy of the union.233/ Frank stated that he would not honor the cherry picker request submitted by the Braun Company because if he did Oberle would be made master mechanic of the entire project, and thereafter would request dissidents for positions on the project instead of Frank's supporters.234/

7. On a Saturday in late January, 1972, Frank telephone Oberle regarding a referral to a cherry picker job in Green Springs, Ohio. When Oberle again refused on the basis of the pending

Braun request Frank stated "If you refuse the job, its down to the bottom again." Oberle, after further conversation, asked Frank if it would be possible to meet and discuss this matter in person. Frank agreed to meet Oberle at the District Two hall the following Monday.235/

8. Frank and Oberle met for several hours the following Monday. Frank told Oberle that he could not be dispatched to the Braun job as it would cause Frank to lose face. Frank further stated that "he would have unity one way or the other, and that he was going to make it so miserable for anybody who asked for a request that nobody was going to have nerve enough to do it."236/

9. In April, 1972 Oberle filed charges with the NLRB over Frank's

refusal to dispatch him as master mechanic to the Braun Construction Company. On June, 1972 the NLRB resolved the issue in favor of Oberle. Upon receiving the NLRB decision, Oberle telephoned Frank with respect to being dispatched to the Braun Construction Company. Despite the decision of the NLRB, Frank again refused to dispatch Oberle to the Braun job. Eventually, upon the advice of an NLRB attorney, Oberle reported to the Braun job without being dispatched by the District Two hiring hall.237/

83a. In 1971 the " 50 mile rule" was in effect in District Two for purposes of applying the two refusal rule. 238/

In early August, 1971 Walter Shimman refused a referral to a job in Napoleon, Ohio. Shortly after this refusal Shimman also refused a job in

Lima, Ohio. Although the Napoleon job was within 50 miles of Shimman's home, the Lima job was approximately 80 miles distant. Shimman, however, refused the Lima job because it entailed exposing his eyes, which had twice been operated on to irritating fumes. Shimman did not expressly invoke the 50 mile rule in refusing the Lima job. Nor does it appear that Shimman had ever invoked the 50 mile rule in regard to any prior referrals, but rather had accepted referrals irrespective of distance.[239/]

b. At the August, 1971 District Two meeting, Frank announced that Shimman's registration card was being returned to the bottom of the deck because Shimman had refused two jobs in succession without good cause.[240/] In response, Shimman stated that the Lima job was more than 50 miles from his

home in any event, and therefore should not be counted as a refusal. Frank replied "you are one of the wise ones and you are at the bottom." Prior to this meeting Shimman was not aware that his card had been returned to the bottom of the deck.241/

c. Following the August, 1971 meeting, Shimman filed a grievance with Frank regarding the application of the two refusal rule to the Lima job. Frank informed Shimman that the grievance had been found lacking in merit and would be forwarded to Local 18 headquarters in Cleveland, Ohio for further consideration.242/

d. In October, 1971 an Executive Board meeting of Local 18 was held at the District Two offices in Toledo, Ohio. At this meeting Walter Shimman

spoke to Possehl with respect to Frank's actions concerning the Lima job, and Frank's general unruly conduct in managing District Two. Shimman concluded by asking Possehl to remove Frank as District Representative of District Two. Possehl replied that he was aware of Frank's conduct, and assured Shimman that such conduct would cease. Possehl told Shimman to file a grievance regarding the Lima job. When Shimman informed Possehl that a grievance had already been filed, Possehl stated that he had not seen it. In response to Shimman's request to remove Frank, Possehl stated "I sent him in to do a job. He hasn't done it yet, and I'm not taking him out of here."243/

e. Shimman's registration card was never restored to its proper place

in the deck as a result of the grievance filed with Local 18.244/ Consequently, in January, 1972 Shimman filed charges with the NLRB alleging that Frank's actions in placing his registration at the bottom of the deck for refusing the Lima job constituted an unfair labor practice. Judgment was ultimately entered in favor of Shimman. 245/

84. At the tabulation of ballots for the 1971 statewide election, Frank, angered at the fact that Ervin Shimman had been elected to the Executive Board for District Two, stated "If its the last thing I do on this earth I am going to starve those Shimmans out."246/

85. In 19[illegible] Roy Rojek, a District Two dissident, was dispatched to the Wellman Power & Gas Company to operate

a bank of generators at a job site in Green Springs, Ohio.247/ During the course of this job, Rojek was approached by James McMahon, Business Agent, who told Rojek that he had been ordered by "the Organization" to have Rojek switch from the generators to a cherry picker in accordance with the District Two policy of reserving less strenuous jobs for older engineers.248/ Rojek refused to switch jobs as he believed that the generators would remain in operation for a considerably longer period than the cherry picker. McMahon, rebuffed, told Rojek, "Now remember, Ray, I'm ordering you to make this switch. This job isn't going to last forever and you're going to have to come into the hall for work, and remember that its the Organization that puts you to work."

249/

86. Rick Shipman, a District Two apprentice, was told by Jack Frantz, 250/ Apprentice Instructor, "If you want to work in Local 18 keep your mouth shut and don't believe a word [Ervin Shimman] says." 251/

87a. From 1969 to date, Kenneth Delaney, a member of the District Two hall group, frequently witnessed District Two Buswness Agents manipulate the referral system in order to refer favored engineers to employment. 252/

b. Business Agent Harley Salisbury would pass over the cards of those engineers at the top of the referral deck until he came upon the card of a favored engineer. Salisbury would then dispatch the engineer of his choice and write "called and not at home" on the

cards of the by-passed engineers.253/

c. In a similar fashion Business Agent Robert Bowes would telephone the engineer at the top of the referral deck, let the phone ring once, hang up, write "called not at home" on the respective engineer's registration card, and then continue on in succession in the same fashion until coming upon the card of a favored engineer. Bowes would then dispatch such engineer.254/

d. Business Agents would "back date" the registration cards of favored engineers in order to raise such engineers referral priority.255/

e. 1. On several occasions Delaney would arrange with the hiring hall to have favored engineers transferred from jobs which were near termination to jobs projected at an extended duration

without going through the referral system, by-passing those engineers in the deck.256/

2. In September, 1974 Delaney was working for the Coolseat Construction Company near Fostoria, Ohio. At that time Harry Hetzel, Coolseat superintendent, needed an engineer experienced in operating a side boom crane. Delaney approached "Frank" Dawes, who was working for the Bernard Pipe Line Company near Perrysburgh, Ohio about transfering to the Coolseat job. Dawes agreed to the transfer, Delaney made all the necessary arrangements with the hiring hall, and Dawes was dispatched to the Coolseat job on September 27, 1974.257/

3. In mid-November, 1974 the side boom crane being operated by Dawes

was terminated. Dawes, rather than re-registering in the referral deck, "rolled" Dan Kirkwood, another engineer, off a loader and continued on the Coolseat job in Kirkwood's place.258/

4. In October, 1974 Richard Pelton was working for M&R Pipeline near Canton, Ohio. Pelton was rained out of the M&R job and approached Delaney and Harry Hetzel with respect to employment on the Coolseat job. Delaney telephoned the hiring hall and arranged to have Pelton dispatched to the Coolseat job. 259/

f. Business Representatives of District Two have manipulated the referral system in order to refer relatives to employment ahead of more experienced, better qualified engineers.260/

88. In 1972, during the pendency

of Oberle's charges with the NLRB regarding the Braun job, Frank sent Delaney to the bottom of the deck under the two refusal rule "to make it look good." In fact Delaney had been out of work for sometime, had been registered in the deck, and had not refused any referrals. Additionally, Frank intended to punish Delaney because Delaney had approached Possehl regarding an appointment to the position of Business Agent without having first obtained Frank's approval.261/

89. In 1974 Jesse Preston, a dissident member from District Three, openly challenged certain statements of William Christian, District Representative, on the floor of a district meeting. Robert Hoover, Chairman of the District Three Rank and File Committee, rose before the meeting and asked Christian to take

Preston's book away. Christian replied "We can't take his book away from him, but we will take care of him through the office."262/

90. The registration card of Robert Eirman, an engineer from District Three, bears the longhand notation:

> 11-11-1973
> Will call when available for work - arthritis in hands. HH.

The initials "H.H." indicate the author of the note, Homer Hysell, Business Agent of District Three. In accordance with this notation Eirman's card was removed from the active file and placed in the inactive file reserved for ill and/or injured engineers. However, Robert Eirman has never had arthritis, nor has he ever requested to be removed from the deck due to arthritis.263/ Nonetheless, Eirman lost an indeterminate amount of

time in the referral deck due to Hysell's actions.

91. Plaintiff has offered the testimony of Dr. John F. Burke, called as an expert witness, to establish by way of statistical interpretation that the referral system was operated in such a fashion as to discriminate against dissidents, and to afford hall group members preferential employment treatment. Close examination of Dr. Burke's testimony reveals, however, that many variable factors were not taken into consideration in concluding that a statistical variance is reflected by the comparative referral treatment of hall group members and dissidents.[264/] Accordingly, the Court attributes no weight to this testimony.[265/]

G. THE BUCKEYE ENGINEER

92. The Buckeye Engineer, Local 18's newspaper, is published on a monthly basis. Publication costs are borne by the Local. The Buckeye Engineer is informational in nature, and is distributed to the entire membership.266/

93a. As Business Manager, Possehl is the editor of the Buckeye Engineer and exercises absolute control over the contents of the newspaper.267/ Possehl also publishes a monthly "Progress Report" which informs the membership of International, Local and administration activities.268/ Since 1970 a small picture of Possehl has accompanied his monthly "Progress Report."269/

b. The remaining defendants, as officials of Local 18, frequently publish articles or are featured in The Buckeye Engineer.270/

94. At times the dissidents of Local 18 have been severely criticized by certain defendants in articles appearing in The Buckeye Engineer:271/

1. November, 1968, "Progress Report."272/

> The defeated candidate has decided to carry on his protest and in all probability Local 18 will find itself spending good dues money to protect our rules, By-laws, and the International Constitution. Dissatisfied losers can always find some lawyers to act in their behalf on a contingency basis.
>
> When we assumed office, we promised to defend every member's right to protest as long as this was done legally, fairly and within reason. Those members who were in charge of the election, our Executive Board, those watchers who were present at the election and the representatives of the Honest Ballot Association all have declared this man wrong in his protest. We think his protest has reached the end of reason-

ableness.

2. May, 1969, "Progress Report." 273/

> This month saw the last lawsuit involving Local 18 and itd dissident members. These suits have involved great expense and loss of time. Expenses and lawyer fees, loss of time by your agents, and loss of time by members who have lost days of work to appear in behalf of Local 18. The efforts of defending the Local, the members and officers have been costly. We hope that now the Local and all members can go forward together to seek better wages and better conditions with no loss of time due to lawsuits. We pledge our office and administration toward that goal.

3. November, 1971, "Progress Report." 274/

> We reported to you in our last Buckeye Engineer the protest to the election of Officers of Local 18 made by William Shimman and William Murphy. These protests were heard and have been denied, after a complete hearing by the Executive Board of Local 18 ruling the protests as being without merit.

Both of these members have now appealed the Local's decision to the International and their appeal will be heard soon by a panel of Vice Presidents.

I can only report that this continued harassment does nothing good for our Local. Our employer enemies must gloat over what seems is internal fighting, when in reality only a small group is protesting -- a group that could be counted on our fingers alone.

This same group is again trying to make political hay of the Supreme Court's refusal to hear our International's petition on the Branch Membership question. They are telling all who will listen that the Department of Labor has ordered a new election for Local 18.

This is not so -- at least no official of the International or of our Local has so been told. Based on a question involving our International Constitution, raised in our 1965 election and carried through the courts to final adjudication, the courts have now ruled that Branch Members, excluding Registered Appren-

tices, will be eligible to run for and hold office in the Local Union.

It was agreed that, upon final disposition of the question, the International and the Department of Labor would agree upon a settlement but that no new election would be ordered when a Local Union in our International followed the International Constitution.

Local 18 did follow our International Constitution and our By-Laws in past elections. If the Department of Labor now violates its agreement, we might be ordered to run another election. (An election at who's cost?)

I am certain the result would be even heavier in favor of those of us who have tried to live by the By-Laws and the Constitution.

4. February, 1972, "Progress Report."275/

Our January State Meeting in Columbus was attended by enthusiastic membership. We had a fine turnout and my thanks to all of you who

supported the position of the administration once again. At the meeting we had Murphy, Caterinacci and others trying to create dissension, but again they failed.

The Executive Aoard itself heard and acted on a number of appeals. Two were from members of our Local -- William Shimman and William Murphy -- who appealed the decisions of our Local's Executive Board finding no merit in their protesting the last election of officers. As on many past occasions neither one showed up and both appeals were denied by the International Executive Board.

The only event that marred this section occurred when William Murphy removed the election lists from the Local's office and the control of the Election Committee and the Honest Ballot Association. Fortunately he was caught before he got beyond Euclid Ave. and the lists were recovered before he could dispose of them. Murphy has been charged with this offense by the Election Committee and will be tried within the Union.

5. March, 1972, "Progress Report."276/

> As we reported to you in our last issue, we have asked the District Federal Court to reconsider the order for Local 18 to rerun our election. This matter will be heard April 7th in Cleveland Federal Court. We will keep you informed.
>
> Last Wednesday, March 22nd, Caterinacci, Murphy, Kelley and others appeared before Chief Judge Frank J. Battisti charging officers of Local 18 with contempt of court. The Cleveland Plain Dealer reported as follows:
>
> "In sharp terms Judge Battisti told Eugene M. Symms, lawyer for the dissidents who brought the action, that the group had no standing in the matter and, furthermore, had not followed correct procedures in filing the action."
>
> This selfish group will stop at nothing that will embarrass your Local. They don't even consider the added costs with which the Local would be faced. What good union men!

6. June, 1972, Report of Presi-

dent Rutherford.[227]/

> On two separate occasions we appeared before the International panel to present Local 18's position on protests of elections that members have filed; but at none of these did the protesting members appear to present evidence to substantiate their protests. Local 18's position was upheld and the protests denied as without merit.
>
> Nevertheless, these two same members demanded that their protests go to the 29th Convention. They were again reviewed without the protesting members appearing. The Convention then voted unanimously to deny the protests as without merit.
>
> These are a few of the unnecessary, time consuming problems processed through the President's Office. This time could have been of your Local Union.

95. Numerous articles have appeared in The Buckeye Engineer in connection with upcoming elections. Only one item, however, appearing in the July, 1972

edition, can be construed as referring to the dissident movement:[278]

> The best way to preserve democracy in our union is for every member to make himself felt at the ballot box. We all know of cases in other unions where a a small minority was able to win an election just because most of the members figured that there was no need to vote. They figured that the candidates they wanted were sure winners anyway. The kind of leadership your union has the next few years can affect your job future and your family's welfare. Take time to protect the future. Take the few seconds you need to mark and mail your ballot. Make up your own mind. And don't fail to vote.
>
> VOTE

Other articles appearing in the Buckeye Engineer can only be considered politically objective:

[279] 1. March, 1968, "Progress Report."

> The only weakness in this election was the apparent lack of interest demonstrated by the

fact that less than one-third of our members returned their ballots.

This is your Local! It belongs to you, the members, only as long as you protect it with your ideas, your plans, and with your ballots. Give us your ideas, write and discuss your plans for the future, and most important of all -- vote your convictions.

280/ 2. July, 1968, "Progreds Report."

Our Local needs your support if we are to successfully know your desires and obtain your wishes. Your vote in this election will either affirm that we are doing what you want or express your dissatisfaction with what your administration is trying to accomplish. Vote either way, but vote! One hundred percent participation would not be too much!

3. June, 1971, Election Committee

Note.281/

We want to assure each member of our Union that no one can possibly know how you voted. Your name and the number, used

only on the outside of the mailing envelope, serve the purpose of identifying the sender as a bonafide, eligible voter -- much the same as the registration Book is used in a voting booth election. The inside sealed envelope, containing the Ballot, retains the secrecy of your vote. Also, your elected committee members will be present at the counting of the ballots to insure that no one shall be able to know how you voted.

We want to impress -- upon each member of this Union -- the value of your vote and urge each one of you to exercise your Right To Vote. We should have a greater number of ballots returned and voted in this election than ever before in the history of our Union.

Will you help do this?

4. January, 1976, Report of President Rutherford.[282/]

The Election Committee along with the Honest Ballot Association are preparing for the election of Delegates and Alternates to the 1976 International Convention to be held

> in April. We urge you to vote in this important election. A Delegate of Alternate to this convention has a responsible position whose actions at the convention will have a direct effect on every Local Union in the International. Vote wisely.

96. Possehl has admitted on cross-examination that as editor he does not permit comments derrogatory of the incumbent administration to be printed in the Buckeye Engineer. However, Possehl has not foreclosed the dissidents from all comment in the newspaper. Following the 1971 officers election William Shimman wrote to Possehl asking to have the following note printed in The Buckeye Engineer:[283/]

> I want to thank each and every one of you that voted for me and especially those who contributed to and helped in my recent campaign. With such local support; be assured, I will continue the fight to bring democracy to our Union.

In response, Possehl agreed to print the note with the exception of the last sentence.[284/] Possehl apparently looked somewhat askance upon Shimman's suggestion that democracy was lacking in Local 18. Further, there has been no evidence adduced that dissidents even requested Possehl to print any other material in The Buckeye Engineer. It does not appear that the rebels ever sought to have the platforms of the respective political factions presented in The Buckeye Engineer. The fact that some editorial judgment is exercised in the management of the newspaper does not establish that The Buckeye Engineer has been used as a political weapon against the dissidents.

H. CONSPIRACY

97. The evidence establishes the existence of a conspiracy between cer-

tain defendants to surpress the actions of plaintiff and the dissident movement. The existence of such conspiracy has been manifested in various acts and statements of the defendants which include, but are not limited to:

a. The organized attempt to prevent the dissidents of District Two from addressing the membership at district meetings.285/

b. The coordinated violence directed at plaintiff and other dissidents.286/

c. Union financing of the defense of civil actions arising out of the above violence.287/

d. The manipulation of plaintiff's trial to assure his conviction.288/

e. The unilateral refusal of the Executive Board to reinstate plaintiff to union membership at the conclusion of his suspension. 289/

f. The manipulation of the referral system as to favor hall group members and punish dissidents.290/

g. The derrogatory and often scatalogical comments directed toward dissidents by defendants. 291/

h. The absolute control exercised by Possehl over the employees and appointed officials of Local 18. 292/

i. The absolute control exercised by Possehl over the elected officials of Local 18.

1. Resignations from elected office have been submitted in such a fashion as to permit the vacancy to be filled in time for the new appointee to run for re-election as an incumbent. 293/ This practice has necessarily assisted the members of Possehl's "slate" in maintaining their respective offices.

2. In filling vacancies in elected offices the line officers and/or Executive Board have always accepted the recommendation of Possehl for such positions. Never once have Possehl's recommendations been rejected. 294/

3. At Possehl's behest the Executive Board has censured dissidents. 295/ Further, open oppostion to the dis-

sident movement has been evidenced by Executive Board members.296/

j. The evidence establishes that Possehl was aware of and condoned Frank's actions in District Two.

1. The rebels of District Two personally informed Possehl of their conflict with Frank.297/

2. Frank submitted weekly reports to Possehl and met with Possehl at staff and Executive Board meetings.298/

3. Frank told Ervin Shimman, "I am the hatchet man from Cleveland. I come in here to chop heads and you are one of the heads I come in here to chop."299/

4. When Walker Shimman requested Possehl to remove Frank, Possehl refused, stating, "I sent him in to do a job. He hasn't done it yet, I'm not taking him out of here."300/

5. Possehl testified that Frank served "without censure, and with correction."301/

6. At the July 5, 1972 District Two meeting the pending

NLRB charges of Oberle and Ervin Shimman against Local 18 were discussed. In reference to these charges Frank stated, "I have defenses I could use, but if I do others will go with me."302/

k. The prohibition of the distribution of campaign literature on union property.303/

VI. STATUTES

29 U.S.C. §185. Suits by and Against Labor Organizations.

(b) Responsibility for acts of agent--Entity for purposes of suit--Enforcement of money judgments.
Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

* * *

(e) Determination of question of agency. For the purposes of this section, in determining whether any person is acting as an "Agent" of another person so as to make such other person responsible for his acts, the question of whether the specific

acts performed were actually authorized or subsequently ratified shall not be controlling.

29 U.S.C. §411 Bill of Rights.

(a)(1) Equal rights. Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.

(2) Freedom of speech and assembly. Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: Pro-

vided, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

* * *

(4) Protection of the right to sue. No labor organization shall limit the right of any member thereof to institute an action in any court or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding, or the right of any member of a labor organization to appear as a witness in any judicial, administrative, or legislative proceeding, or to petition any legislature or to a communicate with any legislator: Provided, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such

organizations or any officer thereof: And provided further, That no interested employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any such action, proceeding, appearance, or petition.

* * *

(5) Safeguards against improper disciplinary action. No member of any labor organization may be fined, suspended, expelled or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

(b) Effect of constitution and bylaws. Any provision of the constitution and bylaws of any labor organization which is inconsistent with the provisions of this section shall be of no force or effect.

29 U.S.C. §412 Civil Enforcement.

Any person whose rights secured by the provisions of this title [29 USCS §§411-415] have been

infringed by any violation of this title [29 USCS §§411-415 of this title] may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located.

29 U.S.C. §414. Right to copies of collective bargaining agreements.

It shall be the duty of the secretary or corresponding principal officer of each labor organization, in the case of a local labor organization, to forward a copy of each collective bargaining agreement made by such labor organization with any employer to any employee who requests such a copy and whose rights as such employee are directly affected by such agreement, and in the case of a labor organization other than a local labor organization, to forward a copy of any such agreement to each constituent unit which has members directly affected by such agreement; and such officer shall maintain at

the principal office of the labor organization of which he is an officer copies of any such agreement made or received by such labor organization, which copies shall be available for inspection by any member or by any employee whose rights are affected by such agreement. The provisions of section 210 [29 USCS §440] shall be applicable in the enforcement of this section.

29 U.S.C. §440. Civil Enforcement.

Whenever it shall appear that any person has violated or is about to violate any of the provisions of this title [29 U.S.C. §431-441], the Secretary may bring a civil action for such relief (including injunctions) as may be appropriate. Any such action may be brought in the district court of the United States where the violation occurred or, at the option of the parties, in the United States District Court for the District of Columbia.

29 U.S.C. §481. Terms of Office - Election Procedures.

(c) Requests for distribution of campaign literature; civil action for enforcement; jurisdiction; inspection of membership lists; adequate safeguards to insure fair election. Every national

or international labor organization, except a federation of national or international labor organizations, and every local labor organization, and its officers, shall be under a duty, enforceable at the suit of any bona fide candidate for office in such labor organization in the district court of the United States in which such labor organization maintains its principal office, to comply with all reasonable requests of any candidate to distribute by mail or otherwise at the candidate's expense campaign literature in aid of such person's candidacy to all members in good standing of such labor organization and to refrain from discrimination in favor of or against any candidate with respect to the use of lists of members, and whenever such labor organizations or its officers authorize the distribution by mail or otherwise to members of campaign literature on behalf of any candidate or of the labor organization itself with reference to such election, similar distribution at the request of any other bona fide candidate shall be made by such labor organization and its officers, with equal treatment as to the expense of such distribution. Every bona fide candidate shall have the right, once within

30 days prior to an election of a labor organization in which he is a candidate, to inspect a list containing the names and last known addresses of all members of the labor organization who are subject to a collective bargaining agreement requiring membership therein as a condition of employment, which list shall be maintained and kept at the principal office of such labor organization by a designated official thereof. Adequate safeguards to insure a fair election shall be provided, including the right of any candidate to have an observer at the polls and at the counting of the ballots.

(e) Nomination of candidates; eligibility; notice of election; voting rights; counting and publication of results; preservation of ballots and records. In any election required by this section which is to be held by secret ballot a reasonable opportunity shall be given for the nomination of candidates and every member in good standing shall be eligible to be a candidate and to hold office (subject to section 504 [29 USCS §504] and to reasonable qualifications uniformly imposed) and shall have the right to vote for or otherwise support the candidate or candidates

of his choice, without being subject to penalty, discipline, or improper interference or reprisal of any kind by such organization or any member thereof....The election shall be conducted in accordance with the constitution and bylaws of such organization insofar as they are not inconsistent with the provisions of this title [29 USCS §§481-483].

29 U.S.C. §482. Enforcement.

(a) Filing of complaint, presumption of validity of challenged election. A member of a labor organization--

(1) who has exhausted the remedies available under the constitution and bylaws of such organization and of any parent body, or
(2) who has invoked such available remedies without obtaining a final decision within three calendar months after their invocation,

may file a complaint with the Secretary within one calendar month thereafter alleging the violation of any provision of section 401 [29 USCS §481] (including violation of the constitution and bylaws of the labor organization pertaining

to the election and removal of officers). The challenged election shall be presumed valid pending a final decision thereon (as hereinafter provided) and in the interim the affairs of the organization shall be conducted by the officers elected or in such other manner as its constitution and bylaws may provide.

(b) Investigation of complaint, commencement of civil action by Secretary; jurisdiction; preservation of assets. The Secretary shall investigate such complaint and, if he finds probable cause to believe that a violation of this title [29 USCS §§481-483] has occured and has not been remedied, he shall, within sixty days after the filing of such complaint, bring a civil action against the labor organization as an entity in the district court of the United States in which such labor organization maintains its principal office to set aside the invalid election, if any, and to direct the conduct of an election or hearing and vote upon the removal of officers under the supervision of the Secretary and in accordance with the provisions of this title [29 USCS §§481-483] and such rules and regulations as the Secretary may prescribe.

The court shall have power to take such action as it deems proper to preserve the assets of the labor organization.

29 U.S.C. §483. Application of other laws.

No labor organization shall be required by law to conduct elections of officers with greater frequency or in a different form or manner than is required by its own constitution or bylaws, except as otherwise provided by this title [29 USCS §§481-483]. Existing rights and remedies to enforce the constitution and bylaws of a labor organization with respect to elections prior to the conduct thereof shall not be affected by the provisions of this title [29 USCS §§481-483]. The remedy provided by this title [29 USCS §§481-483] for challenging an election already conducted shall be exclusive.

29 U.S.C. §501. Fiduciary responsibility of officers of labor organizations.

(a) Duties of officers, exculpatory provisions and resolutions void. The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the

duty of each such person, taking into account the special problems and functions of a labor organization, to hold its money and property solely for the benefit of the organization and its members and to manage, invest, and expend the same in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder, to refrain from dealing with such organization as an adverse party or in behalf of an adverse party in any matter connected with his duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interests of such organization, and to account to the organization for any profit received by him in whatever capacity in connection with transactions conducted by him or under his direction on behalf of the organization. A general exculpatory provision in the constitution and bylaws of such a labor organization or a general exculpatory resolution of a governing body purporting to relieve any such person of liability for branch of the duties declared by this section shall be void as against public policy.

(b) Violation of duties; action by member after refusal or

failure by labor organization to commence proceedings; jurisdiction, leave of court, counsel fees and expenses. When any officer, agent, shop steward, or representative of any labor organization is alleged to have violated the duties declared in subsection (a) and the labor organization or its governing board or officers refuse or fail to sue or recover damages or secure an accounting or other appropriate relief within a reasonable time after being requested to do so by any member of the labor organization, such member may sue such officer, agent, shop steward, or representative in any district court of the United States or in any State court of competent jurisdiction to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization. No such proceeding shall be brought except upon leave of the court obtained upon verified application and for good cause shown, which application may be made ex parte. The trial judge may allot a reasonable part of the recovery in any action under this subsection to pay the fees of counsel prosecuting the suit at the instance of the member of the labor organization and to compensate such member for any expenses necessarily paid

or incurred by him in connection with the litigation.

29 U.S.C. §523. Retention of rights under other Federal and State laws.

(a) Except as explicitly provided to the contrary, nothing in this Act shall reduce or limit the responsibilities of any labor organization or any officer, agent, shop steward, or other representative of a labor organization, or of any trust in which a labor organization is interested, under any other Federal law or under the laws of any State, and except as explicitly provided to the contrary, nothing in this Act shall take away any right or bar any remedy to which members of a labor organization are entitled under such other Federal law or law of any State.

29 U.S.C. §529. Prohibition on certain discipline by labor organization.

It shall be unlawful for any labor organization, or any officer, agent, shop steward, or other representative of a labor organization, or any employee thereof to fine, suspend, expel, or otherwise discipline any of its members for exercising any right to which he is entitled under the provisions of this Act. The provisions of section

102 [29 U.S.C. §412] shall be applicable in the enforcement of this section.

29 U.S.C. §530. Deprivation of rights under Act by violence.

It shall be unlawful for any person through the use of force or violence or threat of the use of force or violence, to restrain, coerce, or intimidate, or attempt to restrain, coerce, or intimidate any member of a labor organization for the purpose of interfering with or preventing the exercise of any right to which he is entitled under the provisions of this Act. Any person who willfully violates this section shall be fined not more than $1,000 or imprisoned for not more than one year, or both.

49 U.S.C. §1981. Equal rights under the law.

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains,

penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. §1983. Conspiracy to Interfer with Civil Rights

Third. If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constitited authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws... in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

O.R.C. §2305.07. Concract not in writing.

> Except as provided in section 1302.98 of the Revised Code, an action upon a contract not in writing, express or implied, or upon a liability created by statute other than a forfeiture or penalty, shall be brought within six years after the cause thereof accrued.

O.R.C. §2305.09. Four years; certain torts.

> An action for any of the following causes shall be brought within four years after the cause thereof accrued:
>
> (d) For an injury to the rights of the plaintiff not arising on contract nor enumerated in sections 2305.10 to 2305.12, inclusive, 2305.14 and 1304.29 of the Revised Code.
>
> If the action is for trespassing under ground or injury to mines, or for the wrongful taking of personal property, the causes thereof shall not accrue until the wrongdoer is discovered, nor, if it is for fraud, until the fraud is discovered.

O.R.C. §2305.10. Bodily injury or injury to personal property.

> An action for bodily injury or injuring personal property shall be brought within two years after the cause thereof arose.

O.R.C. §2305.11. Time limitations for bringing certain actions.

> An action for libel, slander, assault, battery, malicious prosecution, false imprisonment, or malpractice, or upon a statute for a penalty or forfeiture, shall be brought within one year after the cause thereof accrued, ...

O.R.C. §2305.14. For other relief.

> An action for relief not provided for in sections 2305.04 to 2305.131 [2305.13.1], inclusive, and section 1304.29 of the Revised Code, shall be brought within ten years after the cause thereof accrued. This section does not apply to an action on a judgment rendered in another state or territory.

VII. CONCLUSIONS OF LAW

A. RUTHERFORD, BLAIR, AND MILLER

98. Plaintiff has alleged numerous claims under federal and state law against the respective defendants. However, there has been a paucity of evidence adduced as to the liability of Rutherford, Blair or Miller on any of these claims.

b.1. Although there has been evidence presented which indicates that Rutherford harbored some hostility toward plaintiff and the dissident movement, such evidence is not conclusive with respect to plaintiff's allegations as to Rutherford.304/

2. During the election tabulation of February 12, 1972 Rutherford stated: "If I had [plaintiff] up on a plane I would push him out without a

parachute." The case of Broomer v. Schultz, 239 F.Supp. 699 (E.D.Pa. 1965) aff'd 356 F.2d 934 (1966), is particularly illustrative as to the weight to be afforded Rutherford's comment. In Broomer the president of a local union, Schultz, told a dissident member of the local, Garrett, that if Shultz had his way he would tear up Garrett's union book. The court held:

> Schultz's conduct did not constitute a denial of the freedom of expression guaranteed by Section 411. In determining whether Garret's freedom of expression was inhibited this court must consider the setting in which the incident occurred, the statement made by the defendant, and the effect upon the complaint. Not every ungentlemanly remark made by a local union's president to a member is a denial of a Section 411 right.
>
> Schultz prefaced his remakr with "If I had my way," the clear implication of which was that Schultz could not tear up

> Garrett's union book. There is no evidence that Garrett was intimidated by the statement, that the remark caused him to yield the floor, or that it has inhibited him in speaking at business meetings.

Rutherford's comment was clearly of a personal rather than official nature and falls within the ambit of Broomer. Moreover, Rutherford's remarks were directed to Bernard Kelly, not plaintiff and can hardly be said to have intimidated plaintiff from pursuing his political activities on behalf of the dissident movement.

3. Plaintiff has alleged a pendant cause of action against Rutherford for malicious prosecution with respect to the filing of criminal charges against plaintiff for the theft of the election control list. Plaintiff's allegations in this regard, however,

have been raised in excess of one year after plaintiff's cause of action accrued, and therefore plaintiff's claim is barred by the limitation provisions of Ohio Revised Code §2305.11.[305]/

4. Plaintiff asserts that Rutherford's refusal to recuse himself as the presiding officer of plaintiff's trial denied plaintiff a fair and impartial hearing within the context of 29 U.S.C. §411(a)(5). As will be discussed more fully infra, however, Rutherfore was not obligated to recuse himself, nor was plaintiff prejudiced by Rutherford's actions.

5. There has been evidence adduced that Rutherford denied dissident members the opportunity to speak at district meetings other than their own. However, the meetings referred

to were specially called meetings designed to solicit the opinion of each district as to certain proposals of the administration. Rutherford's actions in this regard were limited to these special meetings. In presiding at other state, district, and board meetings, Rutherford did not suppress dissident participation in any meeting.306/ Considering the purpose of the special meetings, Rutherford's actions may well have been reasonable within the context of 29 U.S.C. §411, albeit a technical violation of Local 18's By-laws.307/ Be that as it may, plaintiff was never among the dissidents affected by Rutherford's actions and therefore has not been injured thereby.308/ To the extent Rutherford's actions are indicative of the general animus exhibited

by the hall group toward the rebels, such actions are relevant to plaintiff's conspiracy allegations. However, these actions do not in and of themselves constitute a violation of plaintiff's rights. Moreover, plaintiff has not adduced any other evidence which tends to establish Rutherford's participation in a conspiracy to suppress the dissident movement. In the absence of such evidence, the Court declines to find Rutherford's isolated action with respect to the special district meetings sufficient to implicate Rutherford in such a conspiracy.309/

c. Plaintiff's involvement with Blair and Miller arises exclusively from plaintiff's theft of the control list. Although Blair preferred intra-union charges against plaintiff and Miller pro-

secuted these charges, there is no evidence that either of these defendants acted in bad faith or with ulterior motives. Nor has plaintiff adduced any evidence which establishes that Blair or Miller ever engaged in any other conduct designed to abrogate the rights of plaintiff or any other dissident.[310/]

d. The gravamen of plaintiff's claims, and the evidence adduced at trial, is directed at defendants Possehl, Frank, and Local 18. Plaintiff has failed to carry his burden of proof regarding said claims as to defendants Rutherford, Blair and Miller. The Court, therefore, renders judgment in favor of defendants Rutherford, Blair and Miller on each and every count of plaintiff's complaint.

B. LABOR MANAGEMENT REPORTING AND DISCLOSURE ACT

99. The Bill of Rights for members of labor organizations is set forth in the provisions of 29 U.S.C. §411. In enacting the Bill of Rights Congress intended to protect the relationship between unions and members by providing such members with certain substantive and procedural rights designed to preserve democratic processes in the conduct of union affairs, and due process in the enforcement of union disciplinary measures. E.g. NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175 (1967): Tincher v. Piasek, 520 F.2d 851 (7th Cir. 1975). These provisions are not a "catch-all" for any dissatisfied member, however, but rather guarantee to union members those specific rights set forth therein. E.g. Guarnacci v. Kenin, 234 F.Supp. 429 (S.D.N.Y. 1964) aff'd 339 F.2d 371 (1964)

Nor are these rights absolute in nature. Labor organizations are entitled to enact and enforce reasonable regulations to ensure the orderly process of union business and the preservation of the union as an institutional entity. E.g. Harrison v. Local 54, Amer. Fed. of St., C.&M. Emp., 518 F.2d 1276 (3d Cir. 1975); Kuebler v. Cleveland Lithographers & Photo. U., Loc. 24-P, 473 F.2d 359 (6th Cir. 1973); Semancik v. U.M.W., #5, 466 F.2d 144 (3d Cir. 1972).

100a. The primary enforcement mechanism to redress violations of §411 is 29 USC §412. The scope of §412 is very broad, providing a cause of action for any infringement of the rights guaranteed by §411. E.g. Vars v. Int. Bro. of Boilermakers, 320 F.2d 576, 578 (2d Cir. 1963).

b. A secondary enforcement mechanism with respect to §411 is 29 U.S.C. §529. Although §529 adopts the mechanics of §412, it differs from §412 in two important respects: (1) §529 covers violation of any provision of the LMRDA, whereas §412 is limited to violation of §411; (2) §529 is applicable only to those situations in which a labor organization, or any employer thereof, attempts to "fine, suspend, expel or otherwise discipline" any member, whereas §412 is applicable to any type of infringement of §411 rights. It is apparent, however, that §412 and §529 are to a degree coextensive in their coverage of §411 violations.

c. The provisions of §529 must also be considered along with those of §411(a)(5). Both sections contain the

phrase "fine, suspend, expel, or otherwise discipline." However, each section serves a different purpose, §529 providing substantive protections and §411(a)(5) providing procedural protections: 311/

> Section [411(a)(5)] guarantees to union members, as one of several independent rights conferred upon them by Title I of the Act that they all be accorded procedural due process before being subjected to disciplinary action, for whatever reason. Section [529], on the other hand, has no bearing upon the procedures to be followed in disciplining union members. Section [529] appears in Title VI of the Act, a collection of sections having to do with miscellaneous administrative and enforcement matters; section [529] itself is not a source of additional independent rights, but is an enforcement provision, designed, as we have noted, to effectuate rights conferred in other sections of the act by making it unlawful to punish members who seek to exercise such rights is prohibited by section [529] whether inflicted summarily or after a full pano-

ply of procedural protections.

These sections are similar though, in that their respective safeguards are triggered by union member's exposure to being "fined, suspended, expelled or otherwise disciplined." With the exception of the term "otherwise disciplined" this phrase is self-explanatory and does not require further elucidation. However, the term "discipline" is not unambiguous and requires clarification as its construction is critical to the invocation of §411(a)(5) and §529. A review of the most recent circuit decisions is therefore necessary.

101a. Only one circuit court has set forth a general definition of "discipline" applicable to both §411(a)(5) and §529. In Miller v. Holden, 535 F.2d 912, 915-916 (5th Cir. 1976), the United

States Court of Appeals for the Fifth Circuit held:

> "Discipline" is not defined by the LMRDA and, as the commentators have uniformly acknowledged, the legislative history of the Act is unenlightening. These circumstances make application of the maxim of ejusdem generis particularly appropriate. We therefore construe the general term "discipline" to conform to the essential character of the specifically enumerated types of discipline -- fine, expulsion, and suspension. This process causes us to focus on the motivation of union conduct and the manner in which the penalty is enforced. Union action which adversely affects a member is "discipline" only when (1) it is undertaken under color of the union's right to control the member's conduct in order to protect the interests of the union or its membership and (2) it is directly penalizes him in a way which separates him from comparable members in good standing.
>
> This construction of the statue is implicit in Seeley v. Brotherhood of Painters, 308 F.2d 52 (5th Cir. 1962), where we affirmed the dismissal of §411(a)(5) and §529 claims. We stated

> that the punishment suffered by a union member "must have some relation to the plaintiff's membership in the labor organization" in order to constitute "discipline" under either section. Id. at 59-60. Our opinion today merely clarifies the requisite relation. In particular, it demonstrates that a discharge from employment represents discipline only when the member's employment status is a function of some internal union status, such as hiring hall, or, conversely, a union blacklist.

In so holding, however, the Fifth Circuit expressed some concern over the comparative scope of §411(a)(5) and §529:[312]/

> Some circuits, recognizing the distinct purposes behind the substantive protections of §529 and the procedural protections of §411(a)(5), have held that the former section employs a broader concept of "discipline" than does the latter section. E.G., Grand Lodge of Int. Ass'n of Machinists v. King, 335 F.2d 340 (9th Cir.), cert. denied, 379 U.S. 920, 85 S.Ct. 274, 13 L.Ed. 2d 334 (1964). Our conclusion that this complaint fails to allege

"discipline" within the scope of either statute renders it unnecessary to consider the possibility that §411(a)(5) employs the phrase in a more restrictive sense. But see Wood v. Dennis, 489 F.2d 849, 857-58 (7th Cir. 1973) (en banc) (Stevens, J., concurring), cert. denied, 415 U.S. 960, 94 S.Ct. 1490, 39 L.Ed. 2d 575 (1974).

b.1. The concern expressed by the Fifth Circuit stems from the decision of the United States Court of Appeals for the Ninth Circuit in Grand Lodge of Int. Assn. of Machinists v. King, 355 F.2d 340 (9th Cir. 1964), cert denied, 379 U.S. 920 (1964), and the progeny thereof.[313/] In Grand Lodge the Ninth Circuit held that the summary removal of a union officer from his position for intra-union political activity was not "discipline" within the context of §411(a)(5) as to entitle such officer to procedural safeguards prior to removal, but was "discipline" within

the context of §529 and therefore actionable if violative of such officer's rights as prescribed by the LMRDA.[314/] However, the ruling in Grand Lodge was expressly based upon the legislative history of the LMRDA:[315/]

> The Conference Report on the Act stated that §411(a)(5) "applies only to suspension of member's status or an officer in the union." Senator Kennedy as a Senate conferee, advised the Senate that "this provision does not relate to suspension or removal from a union office." Often this step must be taken summarily to prevent dissipation or misappropriation of funds.

The Ninth Circuit made it clear that the legislative history of the LMRDA, and the facts of the case at bar dictated their ruling:[316/]

> In deference to the "patent legislative intent "it has been held with virtual unanimity that §411(a)(5) does not apply

> to removal or suspension from union office. We think these decisions are correct.
>
> * * *
>
> Whether (and, if so, in what circumstances) a member who is also a union official may be "fined, suspended, expelled or otherwise disciplined," other than by suspension or removal from his union office without complying with [§411(a)(5)], is not before us.

2. Grand Lodge correctly recognized that removal from union office is to be expected from the operation of §411(a)(5) due to the manifest legislative intent of Congress, but Grand Lodge did not broaden the meaning to be afforded the term "discipline" as used in §411(a)(5) vis-a-vis §529. The fact that §529 was found applicable in Grand Lodge is consistent with the respective underlying purposes of §529 and §411(a)(5), i.e. substantive as opposed to pro-

cedural safeguards. This conclusion is reinforced by the holding in Grand Lodge that the removed officer was entitled to redress under §412 as well as §529. Moreover, in subsequent cases dealing with §411(a)(5), but not involving the removal of a union official, the Ninth Circuit has construed "discipline" in a fashion consistent with the Fifth Circuit's holding in Miller. In Phillips v. Int. Assn. of Bridge S.&O. Iron Wkrs., 556 F.2d 939, 941 (9th Cir. 1977), the court held:

> The question here is whether malicious prosecution of a civil suit by a labor organization or its officers acting in their official capacity against a member constitutes "discipline" within the meaning of §411(a)(5). We note that that section does not prohibit union discipline, but rather seeks to provide "safeguards against improper disciplinary action." This suggests that "discipline" refers

> to punishment or adverse consequences that a union, operating through its own tribunal, can impose either by virtue of its own authority over its members or by virture of its relationship with or influence over the actions of the employer or potential employers of its members.

The Ninth Circuit's decision in Phillips is squarely in accordance with the precepts of Miller.

c.1. The concept of "discipline" set forth in Miller and Phillips is also consistent with that espoused by the United States Court of Appeals for the Second Circuit in Morissey v. National Maritime U. of America, 544 F.2d 19 (2d Cir. 1976).[317/] In Morissey a union officer had a member arrested for distributing literature in the union hall in violation of union regulations.[318/] The member subsequently brought suit

against the union alleging that his arrest constituted improper disciplinary action in violation of §411(a)(5). The Second Circuit held:[319/]

> "Discipline" is a word of many meanings. A common one is punishment, particularly by persons in authority, although the word is less appropriate to describe an arrest, or even a prosecution, with no resulting sanction. In any event, common usage does not settle the meaning of "otherwise disciplined" in [§411(a)(5)]. The term must include something more than the usual forms of union discipline -- fines, suspensions, or expulsions -- which are expressly mentioned, but there is a paucity of authority on just what the term does include...
>
> The scope of the prohibition is best illustrated by Congress' statement of what will overcome it. Congress desired to provide "safeguards against improper disciplinary action," not to outlaw union discipline. A union may "otherwise discipline" a member, just as it may fine, suspend, or expel him, if it has served him with written specific charges, has given him a reasonable time to prepare his

> defenses, and has afforded him a full and fair hearing at least in this context, the phrase "otherwise disciplined" must be limited to types of punishment where compliance with these conditions is feasible. The "otherwise disciplined" phrase could not have been meant to cover a decision to call a policeman to remove a member from a union's premises.

2. The Second Circuit's holding in Morissey is in accordance with Miller and Phillips that to constitute "discipline" union action must be imposed upon a member through the operation of the union's tribunal, and must penalize the member in a fashion which separates him from comparable members in good standing. This interpretation is forfeited by the Second Circuit's rejection of the district court's holding that "whether a particular [union] action constitutes discipline is to be

determined by its practical effect."320/

d. Finally, in Bradford v. Textile Wkrs. of America, 563 F.2d 1138 (4th Cir. 1977), the United States Court of Appeals for the Fourth Circuit, in construing 29 U.S.C. §529, cited Miller and Morissey with approval in holding: 321/

> The very phraseology of the term itself, "otherwise discipline", manifests the legislative purpose to give a broad and liberal construction to the term, and one which certainly would comprehend anything in the nature of [union] retaliation for the exercise of the statutorily protected right of free speech in "intra-union political" affairs.

e. The Court finds the reasoning of Miller to be persuasive in the instant case and therefore adopts the definition of "discipline" set forth therein.322/ Further, the Court concludes, being mindful of the exception

set forth in Grand Lodge,[323/] that the phrase "fine, suspend, expel, or otherwise discipline" is entitled to the same construction and scope in both §411(a)(5) and §529. C.f. Miller v. Holden, supra; Wood v. Dennis, 489 F.2d 849, 857-58 (7th Cir. 1973) (en banc) (Stevens, J. concurring) cert. denied 415 U.S. 960 (1978).

102a. As part of a concerted effort by the defendants to suppress the dissident movement of Local 18, plaintiff has been unlawfully subjected to intimidation, physical violence, economic discrimination, and union disciplinary measures. Defendants actions in this regard constitute violations of the rights guaranteed to plaintiff by the Bill of Rights, 29 U.S.C. §411.

b.1. Intimidation, physical violence, and economic discrimination

have been visited upon plaintiff by defendants in retaliation for plaintiff's status and activities as a member of the dissident faction of Local 18.[324/] Such conduct by defendants has violated the substantive provisions of §411 (a)(1), Equal Rights, and §411(a)(2), Free Speech, by infringing upon plaintiff's right to participate in intra-union political activities without fear of reprisal from incumbent political opponents, e.g. Bradford v. Textile Workers of America, supra, Miller v. Holden, supra, Cook v. Orange Belt Dist. Council of Painters, 529 F.2d 815 (9th Cir. 1976); Grand Lodge of Int. Assn. of Machinists v. King, supra; Gleason v. Chain Service Restaurant 300 F.Supp. 1241 (S.D.N.Y. 1969) aff'd 422 F.2d 342 (1970); Retail Clerks U., Local 648 v. Retail Clerks

Int. Assn., 299 F.Supp. 1012 (D.D.C. 1969); George v. Bricklayers, Masons and Plasterers Int. U., 255 F.Supp. 239 (E.D. Wis. 1966); to attend and participate in union meetings,[325/] e.g. Keefe Bros. v. Int. Bro. of Teamsters, Local 592, 562 F.2d 298 (4th Cir. 1977), Semancik v. U.M.W., #5, supra; Shimman v. Grothaus, No. C 73-364 (N.D. Ohio, filed October 15, 1975); Robin v. Shonfeld, 326 F.Supp. 525 (S.D.N.Y. 1971); to meet and assemble freely with other members, e.g. Kuebler v. Cleveland Lithographers & Photo. U., Loc. 24-P, 473 F.2d 359 (6th Cir. 1972); Shimman v. Grothaus, supra; Johnson v. Local 48, IBEW,, 181 F.Supp. 734 (E.D. Mich. 1960); to criticize union officials, e.g. Salzhandler v. Caputo, 316 F.2d 445 (2d Cir. 1963); Sheridan v. Liquor Salesmen's U., Local

2, 303 F.Supp. 999 (S.D.N.Y. 1969); Archibald v. I.U.O.E., 276 F.Supp. 326 (D.R.I. 1967); Deacon v. I.U.O E., 273 F.Supp. 169 (C.D. Cal. 1962); and to picket and distribute literature in opposition to incumbent administration policies,[326/] e.g. Semancik v. UMW, #5, supra; Int. Bro. of Boilermakers v. Rafferty, 348 F.2d 307 (9th Cir. 1965); Gartner v. Soloner, 220 F.Supp. 115 (E.D. Pa. 1963).

2. Plaintiff asserts that defendants' conduct in this regard "constitutes a form of discipline without statutory procedural safeguards in violation of [§411(a)(5)]." However, such conduct fails to fall within the two-prong definition set forth in Miller v. Holden, supra. Although defendants' conduct certainly has penalized plain-

tiff "in a way which separates him from comparable members in good standing," it can hardly be said to have been "undertaken under color of the union's right to control the member's conduct in order to protect the interests of the union or its membership." Such conduct is completely surreptitious in nature and does not bear even the faintest imprimatur of the union's tribunal.[327/] Moreover, defendants' conduct is inimical to the very essence of the union, serving only to promote the selfish political and economic interests of certain select engineers at the expense of their brethren. Such conduct, therefore, does not constitute "discipline" as to give rise to the procedural safeguards of §411(a)(5), or to be actionable under §529. However, defendants' conduct does

constitute an infringement of rights secured by §411 and is therefore redressable under §412. c.l. By rejecting plaintiff's petition for reinstatement to membership in Local 18 at the conclusions of plaintiff's two year suspension, for the express reason that plaintiff had engaged in litigation against Local 18, defendants have violated §411(a)(4).[328/] E.g. Phillips v. Int. Assn. of Bridge, S.&O. Iron Wkrs., Supra; McCraw v. United Assn. of Journey & App. of Plumbing, 216 F.Supp. 655 (E.D. Tenn. 1963) aff'd 341 F.2d 705 (6th Cir. 1965).[329/] Further, defendants actions resulted in plaintiff's continued exclusion from union meetings and activities and did therefore constitute a separate denial of equal rights and freedom of speech and assembly in violation of §411(a)(1)(2), e.g.

McGraw v. United Assn. of Journey & App. of Plumbing, supra, redressable under §412. 2. Defendants' actions, which were tantamount to expelling plaintiff from Local 18,[330/] clearly constitute "discipline" within the context of §411 (a)(5) and §529 as being taken under the official auspices of the union to allegedly protect union and membership interests, and which penalized plaintiff as to set him apart from comparable members in good standing. Under such circumstances plaintiff was entitled to the procedural safeguard of due process set forth in §411(a)(5) prior to his expulsion. In denying plaintiff such due process, defendants have violated plaintiff's rights under §411(a)(5). E.g. Keefe Bros. v. Int. Bro. of Teamsters, Local 592, supra. Further, such action

by the defendants, having been taken in derogation of plaintiff's rights pursuant to §411(a)(5), also violates §529. Such violations are also redressable under §412.

d.1. Plaintiff was denied a "full and fair hearing" as guaranteed by §411(a)(5)(C) in his trial before the membership of District One.[331/]

2. The full and fair hearing requirement of §411(a)(5) has been construed to mean that traditional concepts of due process apply to union disciplinary proceedings. E.g. Kuebler v. Cleveland Lithographers & Photo. U., Loc. 24-P, supra. In this context due process requires that an accused member be afforded notice of the charges lodged against him, an opportunity to be heard and to present evidence, and an impar-

tial tribunal selected in accordance with the union's constitution and by-laws. E.g. Parks v. IBEW, 314 F.2d 886 (4th Cir. 1965); Ritz v. O'Donnell, 413 F. Supp. 1365 (D.D.C. 1976); Kiepura v. Local 1091, USW, 358 F.Supp. 987 (N.D. Ill. 1973); Null v. Carpenters' District Council of Houston, 239 F.Supp. 809 (S.D. Tex. 1965). However, the requirements of §411(a)(5) do not provide an accused union member with the full panoply of rights afforded a defendant in a criminal trial. See e.g. Tincher v. Piasecki, supra; Semancik v. U.M.W., #5, supra; Stein v. Mutual Clerks Guild of Massachusetts, Inc. 384 F.Supp. 444 (D. Mass. 1974) aff'd 560 F.2d 486 (1st Cir. 1977). In this regard an accused union member is not entitled to be represented by counsel of his choice in union disci-

plinary proceedings. E.g. Buresh v. IBEW, Local 24, 343 F.Supp. 183 (D.Md. 1971) aff'd 450 F.2d 1405 (4th Cir. 1972); Sawyers v. Grand Lodge Int. Assn. of Machinists, 279 F.Supp. 747 (E.D. Mo. 1967); Cornelio v. Metropolitan District Council of Philadelphia, 243 F.Supp. 126 (E.D. Pa. 1965) aff'd 358 F.2d 728 (3d Cir 1966) cert. denied 386 U.S. 975 (1967).[332/] Nor need the pleadings in such proceedings comport with the standards generally applicable to legal documents. E.g. Eisman v. Baltimore Reg. Joint Bd. of Amal. Cloth. Wkrs., 352 F.Supp. 429 (D.Md. 1972) aff'd 496 F.2d 1313 (4th Cir. 1974).

3. In reviewing the merits of a union disciplinary hearing, the Court is limited to determining whether there was some evidence presented by the

charging party to support the verdict returned. E.g. Charron v. Am. Fed. of St., Co., & Mun. Emp. U., 470 F.2d 156 (6th Cir. 1972). The Court is not free to independently evaluate the sufficiency of the evidence presented, nor to substitute its judgment for that of the union tribunal. E.g. Vars v. Int. Bro of Boilermakers, supra; Burke v. Int. Bro. of Boilermakers, 302 F.Supp. 1345 (N.D. Cal. 1967) aff'd 412 F.2d 1063 (9th Cir. 1969). In determining whether union disciplinary proceedings have complied with §411(a)(5), the Court may not consider either the merits of the preferred charges, e.g. Int. Bro. of Boilermakers v. Hardeman, 401 U.S. 233 (1971), or the motive of the charging party. E.g. Burke v. Int. Bro. of Boilermakers, supra; Pittman v. United Bro. of Car-

penters, 251 F.Supp. 323 (M.D. Fla. 1966). So long as the accused union member receives notice of specified charges, a fair trial, and an impartial determination of guilt, the Court's inquiry is ended.[334]/

4. There is no doubt that the sine qua non of a fair and full hearing is an impartial tribunal. There is a split among authorities, however, as to the standard by which impartiality is to be adjudged. In Ritz v. O'Donnell, supra at 1371, this split is discussed:

> Apparently plaintiff Ritz alleges that the tribunal was biased, and therefore his hearing was not a fair one. It is, of course, well settled that an impartial tribunal is requisite to a full and fair hearing. See Ticher v. Piasecki, 520 F.2d 851, 854 (7th Cir. 1975); Falcone v. Dantinne,, 420 F.2d 1157, 1166 (3d Cir. 1969); Parks v. International Brotherhood of Elec. Workers, 314 F.2d 886,

912 (4th Cir. 1963), cert. denied, 372 U.S. 976, 83 S.Ct. 1111, 10 L.Ed. 2d 142 (1963). There exists some disagreement over the standard by which impartiality is to be adjudged, however. In Parks, supra, the court held that only upon a showing of "specific prejudice" as opposed to "built-in-bias" can a federal court find a tribunal biased. 314F.2d at 912-13. No other case has specifically stated as much. In Falcone, supra, the court held that plaintiff was denied a full and fair hearing where one of the tribunal had, according to the evidence, prejudged the case against plaintiff. 420 F.2d at 1166-67; see also Stein v. Mutuel Clerks Guild of Massachusetts, Inc., 384 F.Supp. 444, 447-48 (D.Mass. 1974) (one of tribunal prior to hearing stated that men charged were guilty and ought to be punished, full and fair hearing denied). In Tincher, supra, however, the Seventh Circuit held that participation on the tribunal by a person who has been charged with wrongdoing in another union proceeding by one of the charged parties he is called upon to judge renders the tribunal so improper as to amount to

> denial of a full and fair hearing. 520 F.2d at 855. Even though the tribunal member stated under oath that the charge had no effect on his decision "[t]he circumstances themselves, by presenting a significant danger of bias, created the inherent impropriety" leading to denial of a full and fair hearing. Id.

The Court in Ritz did not resolve this controversy, however, holding that under any of the foregoing standards the plaintiff had not been denied an impartial hearing.355/

5. The authorities are in accord that under any standard of impartiality a demonstration of specific bias on the part of the finder-of-fact in a union disciplinary hearing vitiates the entire proceeding. Compare Tincher v. Piasecki, supra; Falcone v. Dantinne, 420 F.2d 1157 (3rd Cir. 1969); and, Parks v. IBEW, supra. The Court is of

the opinion, however, that "specific bias" should not be applied as an absolute standard in all cases. Rather, each case must be analyzed on its own facts in order to determine whether the probability of bias is so manifest as to encroach upon the full and fair hearing requirements of §411(a)(5). This inquiry necessarily entails consideration of such factors as the nature of the preferred charges; whether investigatory, prosecutorial or judicial functions are combined in the same individual or body; the relationship between the parties and members of the tribunal and; any factor which emerges a being unique to the disciplinary mechanisms involved in a particular case. The Court's conclusion that a case-by-case approach is necessary in this area is supported by

a careful consideration of the authorities which have addressed the issue.

6. Falcone, which presented and was decided upon an issue of specific bias, was decided by an equally divided court, Judge Stahl rendering the opinion, with Judge Biggs and Judge Freedman stated:336/

> But I disagree with the statement that there is no "inherent impropriety" in a union officer sitting as a member of the Trial Body after he has participated in the informal [investigatory] hearing. In my view, it does not matter that "no element of bias or prejudgment" is specifically proven. The circumstances themselves create the inherent impropriety.

Judge Biggs, in concurring, agreed with the views of Judge Freedman, and further commented upon methods which should be utilized to ensure the selection of an impartial tribunal. Falcone, therefore, recognized the applicability of the

"inherent impropriety" standard espoused in Tincher.

7. The United States Court of Appeals for the Sixth Circuit has also indicated that bias resulting from "built-in" factors is unacceptable. In Kuebler v. Cleveland Lithographers and Photo, U., Loc. 24-P, supra, wherein the court cited Falcone with approval for the concept that a full and fair hearing requires the application of traditional due process, the court stated:337/

> In effect his trial before a Board whose membership was never divulged to him, but which is conceded in brief to have been made up of the same parties who investigated the charges against him, was his only hearing.*** Thus appellants only hearing was before a tribunal which lacked the impartiality of a court and he was denied the opportunity for an effective appeal. He was not afforded a full and fair hearing and the proceedings against him were void.

In recognizing that a tribunal made up of the same parties that investigated the charges against an accused member cannot be considered impartial, the Sixth Circuit is in accord with Falcone and Tincher that under certain circumstances bias may be manifestly inherent in union disciplinary proceedings.

8. Tincher, without further clarification, stands as direct authority for the proposition that certain circumstances in a union disciplinary proceeding may, by presenting a significant chance of bias, create such inherent impropriety in the proceeding as to violate the provisions of §411(a)(5).

9. In rejecting the concept that "built-in bias" never violates §422(a)(5), the Court does not imply that courts may now judicially restructure union discipli-

nary mechanisms. See Parks v. IBEW, supra at 913. The Court's ruling simply permits inquiry into the composition of union tribunals insofar as preserving the due process guarantees of §411(a)(5). See Semancik v. UMW, #5, supra; Kiepura v. Local 1091, USE, supra. Such inquiry in no way affects the mechanics of any union disciplinary procedures, and does not impermissibly intrude in union affairs.

10. The evidence establishes that defendants made every effort to manipulate the composition of plaintiff's jury in order to ensure his conviction. At defendants' behest, an unknown number of engineers who had no intention of voting to acquit plaintiff, irrespective of the evidence presented, attended plaintiff's trial and served as members

of plaintiff's jury. Defendants' actions in this regard, and the demonstrated specific bias of certain engineers who served on said jury,[338/] imbues plaintiff's trial with such inherent impropriety as to vitiate the full and fair hearing requirement of §411 (a)(5). As defendants' conduct in this regard was of a surreptious nature, it does not fall within the purview of 29 U.S.C. §529. However, such conduct is redressable under 29 U.S.C. §412.

11. Plaintiff asserts that Rutherford was severely biased against him, and therefore Rutherford's refusal to recuse himself as presiding officer of plaintiff's trial violates §411(a)(5). The Court is of the view, however, that Rutherford was sufficiently removed from the jury in plaintiff's trial as to pre-

clude any finding of prejudice to plaintiff.

12. Rutherford served on the Advisory Board that recommended plaintiff be tried on the charges preferred by Blair, and on the Executive Board that referred plaintiff's trial to District One.[339/] By such actions, Rutherford did to some degree serve in an investigatory and advisory capacity regarding the charges against plaintiff. Rutherford's participation in the pretrial phase of plaintiff's disciplinary proceeding, when considered in conjunction with Rutherford's demonstrated animus toward plaintiff would have justified plaintiff's request for recusement had Rutherford then been part of a fact-finding tribunal comprised of a limited number of engineers. Under duch circumstances, Rutherford's participation

in the deliberation process and influence upon the remaining members of the tribunal would certainly rise to the level of "inherent impropriety" denounced in Falcone, Kuebler and Tincher.[340/] However, such a "limited" tribunal was not convened. Rather, plaintiff's fact-finding tribunal consisted of hundreds of operating engineers. Further, there were no extended deliberations at the conclusion of plaintiff's trial, balloting on the verdict being conducted promptly at the close of trial. Rutherford's input, therefore, into the deliberative process was no greater than any other engineer who cast a ballot, including plaintiff.

13. As Rutherford had no direct impact on the deliberations of plaintiff's jury, the issue is narrowed to

whether Rutherford's actions as presiding officer were so biased as to deny plaintiff a full and fair hearing.[341] Upon reviewing the record of plaintiff's trial, the Court does not find such a showing of bias.[342] Considered as a whole, plaintiff's trial was conducted in an orderly and efficient manner.[343] Nor was the sentence imposed upon plaintiff at the conclusion of trial overly excessive.[344] E.g. Reyes v. Laborers Int. U., Local 16, 464F.2d 595 (10th Cir. 1972) cert. denied 411 U.S. 915 (1973). Although there may have been some degree of "built-in bias" as a result of Rutherford's participation in plaintiff's trial, it does not rise to such a level of inherent impropriety as to violate §411(a)(5).[345]

e.1. Defendants' refusal to re-register plaintiff's employment referral card following his trial constitutes a form of discipline imposed without the due process safeguards of §411(a)(5).

2. Plaintiff's referral card was ostensibly removed from the out-of-work deck as further punishment for plaintiff's conviction of stealing the election control list.[346/] Such punishment, if within the authority of Local 18, [347/] is permissible only if imposed after complying with the requirements of §411(a)(5). Had §411(a)(5) been complied with the only issue remaining for the Court's consideration would be Local 18's power to impose such additional punishment. However, in order to comply with §411(a)(5), plaintiff must not only

have received a full and fair hearing on the preferred charges, but the dicipline imposed must also have been based upon said charges. Vars v. Int. Bro. of Boilermakers, supra (Hays J. concurring). In the instant case, Possehl testified that plaintiff's referral card was removed not only for plaintiff's conviction, but also for plaintiff's failure to provide a working phone number, and "the whole thing."[348/] Therefore, aside from the Court's ruling that plaintiff was denied a full and fair hearing in violation of §411(a)(5), plaintiff was clearly subjected to punishment for actions which were neither included in Blair's charges, nor considered in plaintiff's trial before the membership of District One. Defendants' actions in this regard constitute an independent

violation of §411(a)(5)[349] separate and apart from any irregularity in plaintiff's trial.[350] Further Possehl's conduct was ostensibly taken under authority of Local 18 and on behalf of the membership, and therefore constitutes discipline within the context of 29 U.S.C. §529. Possehl's conduct in this regard is redressable under 29 U.S.C. §412.

f.1. Local 18's requirement of a "working telephone number," and defendants' refusal to accept plaintiff's answering service as such a number does not constitute a violation of §411.

2. In refusing to accept plaintiff's answering service as a "working telephone number", defendants acted upon the established policy of Local 18 as set forth in Article X, §1 of the By-laws. The enforcement of such declared

union policy is not offensive to §411(a)(5):

> [T]he action taken by the union was prospective and applied to the entire membership and not to plaintiff alone. It can hardly be said that "discipline" within the meaning of the statute [§411(a)(5)] includes action that may be taken, or rather withheld by the union, as a matter of policy.

Scoville v. Watson, 368 F.2d 678, 680 (7th Cir. 1964)[351/]; See also Williams v. Int. Typographical U., 423 F.2d 1295 (10th Cir. 1970) cert. denied 400 U.S. 824 (1970); Sigueroa v. National Maritime U. of America, 342 F.2d 400 (2d Cir. 1965). The fact that defendants were required to interpret and construe the provisions of Article X, §1 in determining that plaintiff's answering service was not a working telephone number does not alter this conclusion. Some latitude must be afforded union offi-

cials in interpreting and enforcing the governing provisions of union constitutions and by-laws. Cf. Int. Bro. of Boilermakers v. Hardeman, supra. Further, defendants gave plaintiff every opportunity to comply with the requirement of Article X, §1. As said requirement applied equally to all members of Local 18, and in no way discriminated against plaintiff, its enforcement did not constitute dicipline as to entitle plaintiff to procedural due process under §411(a)(5), or redress under §529. E.g. Miller v. Holden, supra.

3. Nor did defendants enforcement of Article X, §1 violate any other provisions of §411. The requirement of a working phone number is clearly intended to further Local 18's interest in performing its legal and contractual obligations under the applicable col-

lective bargaining agreements to which it is a party. Such a requirement is therefore excepted from the operation of §411. E.g. Harrison v. Local 54, Amer. Fed. of St. C. & M. Emp., 518 F.2d 1276 (3d Cir. 1975); Salzhandler v. Caputo, supra. Further, in registering for referral to employment plaintiff sought to avail himself of the benefits to be derived from the operation of Local 18's hiring hall. Plaintiff may not thereafter ignore the requirements essential to the operation of the referral system, and then later complain that his protected rights have been violated. Plaintiff may not create a violation of §411 through his own unreasonable conduct.[352/] Cf. Kuebler v. Cleveland Lithographers & Photo. U., Local 24-P, supra; Sewell v. Grand Lodge of Int. Assn. of Mach.

& Aero. Wkrs., 445 F.2d 545 (5th Cir. 1971), cert. denied 400 U.S. 1024 (1971); Eisman v. Baltimore Reg. Joint Bd. of Amal. Cloth. Wkrs., supra.

103a. The right of union members to inspect the collective bargaining agreements to which their union is a signatory is guaranteed by 29 U.S.C. §414. The underlying purpose to the enactment of §414 is to permit employees to enforce their rights under applicable collective bargaining agreements by allowing them to see what benefits they are entitled to under such agreements. Consistent with this purpose the United States Department of Labor has adopted the position that the right of an employee to see any governing collective bargaining agreement under §414 includes the right to see any work referral lists which are incorporated by reference in

such agreements.[353/]

b. The enforcement mechanism of §414 is found in §440. There is some conflict as to whether private individuals may sue under §440, or whether enforcement responsibilities lie exclusively with the Secretary. Compare Forline v. Helpers Local No. 42, 218 F. Supp. 315 (E.D. Pa. 1962) with Broomer v. Schultz, supra. The Court need not resolve this controversy, however, in view of the Court's holding that plaintiff was denied access to the referral deck due to his own unreasonable and disruptive conduct.[354/] Under these circumstances, irrespective of which party is properly charged with the enforcement responsibilities of §440, plaintiff is not entitled to any recovery.

104a. Title IV, Elections, of the LMRDA, 29 U.S.C. §§481-483, establishes a set of substantive rules governing union elections, and provides a comprehensive procedure for enforcing these rules. Trbovich v. UMW, 404 U.S. 528 (1972). The objective of Title IV is to guarantee free and democratic union elections by which the rank and file may participate fully in their union through processes of democratic self-government, thereby keeping the union leadership responsive to the members. USW v. Usery, _____U.S. _____, 97 S. Ct. 611 (1977).

b. The enforcement mechanism of Title IV is set forth in the provisions of 29 U.S.C. §482, which vests the Secretary of Labor with exclusive authority to enforce violations of Title

IV through post-election proceedings. The provisions of §482 are supplemented by 29 U.S.C. §483, which provides that the rights and remedies existing independent of the LMRDA remain in full force and effect, with the exception that the remedies of §482 are exclusive with respect to actions challenging an election already conducted. E.g. Trbovich v. HMW, supra; Morrissey v. Curran, 356 F.Supp. 312 (S.D.N.Y. 1973).

c. Two principal reasons underlie Congress' decision to concentrate post-election remedies in the Secretary; (1) to protect unions from frivolous litigation and unnecessary judicial interference with their elections, and; (2) to centralize in a single proceeding such litigation as might be warranted with respect to a single election.

Trbovich v. HMW, supra; Hodgson v. Local U. 6799, 403 U.S. 333 (1971). Pursuant to this rational, the provisions of Title IV concerning the conduct of an election may be enforced only in accordance with the post-election procedures of §482. Dunlop v. Banhowski, 421 U.S. 560 (1975) on remand 405 F. Supp. 1127 (W.D. Pa. 1975).

d. The singular exception to the exclusive enforcement power of the Secretary is found in 29 U.S.C. §481(c). This section provides that bona fide candidates for union office may prior to an election bring private enforcement actions with respect to certain pre-election conduct. E.g. Calhoon v. Harvey, 379 U.S. 834, 140 (1964). Such conduct, however, must bear upon the guarantees of §481(c): the right to

have campaign literature distributed to the membership at the candidate's expense, the right to nondiscriminatory treatment in the use of membership lists for election purposes, the right to inspect the membership list within thirty days prior to the election and, the right to adequate safeguards to insure a fair election. The provisions of §481(c) are not an open invitation to union members to challenge any union practices which may reflect upon the elective process, but are to be narrowly construed in accordance with the Congressional intent to minimize judicial interference in union elections. In this regard, a complaining union member must be a bona fide candidate, seeking to challenge union conduct proscribed by §481(c), regarding a specific election in which

such candidate has been nominated or is actively seeking nomination. See e.g. Driscoll v. IUOE, Local 139, 484 F.2d 682, n. 11 & 12 at 688 (7th Cir. 1973), cert. denied 415 U.S. 960 (1974); Russo v. Local 676, H. Assn. of Plumb. & P.I. of H.S. & Can., 372 F.Supp. 1265 n.1. at 1268 (D. Conn. 1974); aff'd 493 F.2d 1398 (1974); Shonfeld v. Raftery, 359 F. Supp. 380 (S.D.N.Y. 1973); Schonfeld v. Raftery, 335 F. Supp. 846 (S.D.N.Y. 1971).[355/] Further, candidates may not avoid the preclusive effect of Title IV by alleging that the pre-election relief sought is enforceable under other sections of the LMRDA, [356/] and therefore is not a post-election remedy available only through the Secretary. See e.g. Driscoll v. IUOE, Local 139, supra; Schonfeld v. Raftery,, supra, 335 F.

Supp. Such allegations impermissibly attempt to "sweep into the ambit of [a candidate's] right to sue in federal court", actions lying within the exclusive province of the Secretary. Calhoon v. Harvey, supra at 138. Possible violations of Title IV may not be combined with other violations of the LMRDA to afford union members an expanded right to institute pre-election suits concerning violations of Title IV. E.g. Calhoon v. Harvey, supra; see Ross v. IBEW, 513 F.2d 840 (9th Cir. 1975).

105a. Plaintiff has alleged widespread violations in the election practices of Local 18. Initially, plaintiff asserts that defendants have: imposed onerous eligibility requirements on candidates for office in Local 18; denied plaintiff access to the membership lists

of Local 18; enacted oppressive election rules which preclude plaintiff and other dissidents from exercising their right to make reasonable requests for the distribution of campaign literature.[357/] Plaintiff has styled these allegations as constituting violations of 29 U.S.C. §411. Additionally, plaintiff asserts that defendants have impermissibly utilized the Buckeye Engineer to publicize defendants slate of candidates, and to disparage plaintiff and his fellow dissidents. Plaintiff contends that as he has "consistently and repeatedly run for political office in Local 18", and since he "does not seek to invalidate an election already held", he may maintain a private cause of action under §481(c) to control the use of such publicity in future elections.[358/]

b.1. Although plaintiff has characterized certain of his allegations as constituting violations of 29 U.S.C. §411, it is readily apparent that plaintiff has in fact alleged various violations of 29 U.S.C. §481.

2. Plaintiff's allegations regarding candidate eligibility are governed by §481(e). This section contains no provision for enforcement by individual union members in either pre-election or post-election proceedings. The Secretary of Labor is vested with exclusive authority to enforce this section pursuant to 29 U.S.C. §482, and plaintiff has no standing to raise such allegations in the present proceeding.

3. Plaintiff's remaining allegations fall squarely within the purview of §481(c). The language of

§481(c) is clear and unambiguous in providing that only a bona fide candidate in a specific election may bring suit under this section, and then only as to that particular election. The fact that plaintiff has been a candidate in past elections in which he feels violations of §481(c) have occurred does not vest plaintiff with standing to seek injunctive relief for all future elections. Plaintiff may not avoid the clear import of §481(c) by resort to a self-styled "continuous candidate rule". Nor may plaintiff avoid the preclusive effect of Title IV by styling his cause of action as arising under 29 U.S.C. §411.[360/] Calhoon v. Harvey, supra; Ross v. I.B.E.W., supra; Driscoll v. IUOE, Local 139, supra; Schonfeld v. Raftery, supra 335 F. Supp. The Court, therefore, lacks

jurisdiction to consider plaintiff's allegations that defendants have violated §481(c). 4. The Court's present ruling does not, of course, preclude plaintiff from pursuing any state remedies available to him under 29 U.S.C. §483.

c.1. Notwithstanding the Court's finding that it lacks jurisdiction to consider plaintiff's §488(c) allegations, the parties have expended considerable efforts in regard to such allegations and some guidance in this area is therefore warranted. 2. The provisions of §481(c) impose a legally enforceable mandate upon unions to comply with a candidates reasonable request to mail campaign literature to the union membership at the candidate's expense. E.g. Wirtz v. American Guild of Variety Artists, 267 F.Supp. 527

(S.D.N.Y. 1967). The union need not produce its membership list carte blanche to the candidate for his use in this regard, but must provide an efficient procedure for complying with the requirements of §481(c). Additionally, the union can require a candidate to submit his literature to the union for approval prior to mailing, so long as the union does not engage in censorship of such literature. E.g. Amalgamated Cloth. Wkrs. v. Amalgamated Cloth Wkrs., 334 F.Supp. 760 (E.D.Pa. 1971) aff'd 473 F.2d 1303 (1973). In this instant case, Local 18 accepts and mails all candidate campaign literature out of its District One office. Plaintiff has in fact made use of this service and has never been denied the right to have campaign literature mailed. 3. The requirements of §481

(c) that union candidates be afforded nondiscriminatory treatment with respect to membership lists, precludes incumbents from denying opposing candidates access to such list while utilizing it themselves to carry on electioneering activity. Cf. New Watch-Dog Committee v. New York City Taxi Drivers U., supra. However, the fact that an incumbent officer may have access to the union's membership list in the normal course of his assigned duties does not give his opponent an automatic right to copy the list. E.g. Conley v. Aiello, 276 F.Supp. 614 (S.D.N.Y. 1967). Absent proof that such incumbent officer has copied the membership list, or is actually using the list in his campaign, the union is not required to permit such officer's opponent to copy the list. E.g. Conley v. Aiello,

supra. A good deal of diverse evidence has been presented in this case regarding the membership lists of Local 18. Such evidence fails to establish, however, that defendants have in fact copied or utilized the membership lists in connection with any election campaign.

4. The right to nondiscriminatory access to union membership lists includes the right to nondiscriminatory coverage in and utilization of union publications. E.g. New Watch-Dog Committee v. New York City Taxi U., supra; Morrissey v. Curran, supra; Yablonski v. U.M.W., 305 F.Supp. 868 (D.D.C. 1969) supplemented 305 F.Supp. 876. However, duly elected officials have a right and a responsibility to exercise the powers of their office and to advise and report to the membership on issues of general

concern. In accordance with this responsibility, elected union officials are entitled to use union publications to express their views, and are not ordinarily required to give space therein to the expression of contrary views, provided they do not interfere with whatever rights members may have to communicate their views to other members.[361/] E.g. Sheldon v. O'Callaghan, 497 F.2d 1276, 1282 (2d Cir. 1974) cert. denied 419 U.S. 1090 (1974). To some extent incumbent officers must always be recognized as potential candidates for re-election. In this regard, it is a fine line as to when the coverage of an incumbent official by a union publication becomes so excessive column-wise or pictorially as to constitute impermissible campaigning for re-election.[362/]

Yablonski v. U.M.W., supra. So long as such coverage is addressed to the regular functions, policies and activities of such incumbents as officers involved in matters of interest to the membership, and not as candidates for re-election, there is no violation of §481(c). E.g. New Watch-Dog Committee v. New York City Taxi Drivers U., supra; Sheldon v. O'Callaghan, supra 335 F.Supp.

5. The Buckeye Engineer features regular reports by the officers of Local 18, and highlights administrative accomplishments. However, such reports and accomplishments bear upon the working environment of every member of Local 18. The very duties incumbent upon the officers mandates such communication with the membership. Moreover, these reports do not appear to vary in form or sub-

stance from election to non-election years, and cannot be equated with the presentation of an election platform. Nor can it be concluded, considering the chronology and contents of the items critical of the dissident movement that the Buckeye Engineer has been utilized to release disparaging comments about plaintiff and his fellow dissidents immediately prior to Local 18 elections. Although the critical comments are at times harsh, such comments appear randomnly throughout the various editions, and coincide with events rather than elections. At times months, even years lie between such comments. The Buckeye Engineer does not evidence a consistent concentrated practice of coverage of incumbent officers, and denigration of dissidents as to cross that fine line

which distinguishes proper reporting from re-election campaigning.[363]/

6. Finally, pursuant to §481 (c) union candidates are entitled to inspect the membership lists within thirty days of election, but inspection does not include the right to copy the lists. E.g. Morrissey v. Curran, supra; Conley v. Aiello, supra; Wirtz v. American Guild of Variety Artists, supra. This interpretation is mandated by the clear legislative intent of Congress to restrict access to membership lists in order to prevent abuse of such lists by employers, rival unions, subversive organizations and the like. E.g. Conley v. Aiello, supra. Accordingly, even as a bona fide candidate plaintiff has no right to copy the membership lists of Local 18 incident to his right of inspection under §481(c).

106a. The provisions of 29 U.S.C. §501(a) imposes a fiduciary duty upon union officers to hold union funds and property solely for the benefit of the union and its members, and to manage, invest, and expend the same solely in accordance with this purpose. A violation of §501(a) is redressable under 29 U.S.C. §501(b) by individual union members provided that two conditions precedent have first been satisfied: (1) the union itself has refused the request of the individual member to enforce §501 (a) in its own right, and, (2) leave of court to bring the enforcement action has been obtained by the individual member. E.g. Woods v. Local #12, Sheet Metal Wkrs. Int. Assn., 438 F.Supp. 578 (W.D. Pa. 1977).

b. Defendants have violated

the provisions of §501(a) by causing the expenditure of union funds for the purpose of defending various civil and criminal actions brought by plaintiff against agents of defendants.[364/] E.g. Cohen v. Highway Truck Drivers & Helpers, Local 107, 334 F.2d 378 (3d Cir. 1964) cert. denied 379 U.S. 921 (1964); Milone v. English, 306 F.2d 814 (D.C. Cir. 1962). [365/] However, plaintiff is precluded from raising this claim pursuant to §501(b), in that plaintiff failed to request Local 18 to prosecute such an action,[366/] and plaintiff failed to obtain leave of this Court to bring suit. E.g. Woods v. Local 12, Sheet Metal Wkrs. Int. Assn., supra; Safe Wkrs. Org. Chap. No. 2 v. Ballinger, 389 F.Supp. 903 (S.D. Ohio 1974). Nevertheless, plaintiff retains his right to pursue any state re-

medies available to him. Safe Wkrs. Org. Chap. No. 2 v. Ballinger, supra.

107. Plaintiff has alleged a cause of action under 29 U.S.C. §530 arising out of the physical violence visited upon plaintiff. However, §530 prescribes criminal penalties for such acts and may not be enforced in a civil action. E.g. Shonfeld v. Raftery, supra 335 F.Supp.

C. FAIR REPRESENTATION

108. The provisions of 29 U.S.C. §185 impose upon Local 18[367/] the obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty and to avoid arbitrary conduct. Vaca v. Sipes, 386 U.S. 171, 177 (1967). This obligation includes the duty of the union to fairly represent all of its members

both in the conduct of collective bargaining and in the enforcement of the resulting collective bargaining agreement. 368/ E.g. Emmanuel v. Omaha Carpenters Dist. Council, 535 F.2d 420 (8th Cir. 1976) on remand 422 F.Supp. 204 (D. Neb. 1976) aff'd 560 F.2d 382 (8th Cir. 1977); Buzzard v. Local 1040, IAM, 480 F.2d 35 (9th Cir. 1973); Retana v. Apartment, Motel, Hotel & El. Op. U., Local 14, 453 F.2d 8018 (9th Cir. 1972). In this regard, a union may not in bad faith or with a dishonest purpose interfere with the employment rights of its members, as conferred by an applicable collective bargaining agreement. See e.g. Trait v. Int. Bro. of Teamsters, 542 F.2d 961 (6th Cir. 1976); Hill v. Iron Wkrs., Local 25, 520 F.2d 40 (6th Cir. 1975); Emmanuel v. Omaha Carpenters Dist. Council,

supra; see Byrd v. Local 2, I.B.E.W., 375 F.Supp. 545 (D.Md. 1974). Such discrimination is "intentional, severe and unrelated to legitimate union objectives", Amalgamated Association of Street Electric Railway and Motor Coach Employees of America v. Lockridge, 403 U.S. 274, 301 (1971), and is offensive to the letter and spirit of §185. In so acting, Local 18 has breached its statutory duty of fair representation to plaintiff.[369]/

D. CIVIL RIGHTS

109. Plaintiff has asserted that defendants have discriminated against him in violation of 42 U.S.C. §1981. However, it is clear from the language of this section, and the applicable judicial precedent, that §1981 is intended to redress racial discrimination. E.g. Winston v. Lear-Siegler, Inc., 556 F.2d

1266 (6th Cir. 1977). Plaintiff accordingly; is not entitled to relief under 42 U.S.C. §1981.

110a. In the landmark case of Griffin v. Breckenridge, 403 US. 88 (1970), the United States Supreme Court determined that the provisions of 42 U.S.C. §1985(3) reaches private conspiracies. The Supreme Court set forth four elements which must be satisfied in order to establish a violation of §1985 (3):

> 1. A conspiracy of defendants,
>
> 2. With a purpose of depriving plaintiff of equal protection of the law or equal privileges or immunities under the law,
>
> 3. An intent to discriminate, 370/ i.e. there must be some racial or otherwise class based invidiously discriminatory animus behind the conspirators action, and
>
> 4. Injury to the person or property of plaintiff or his

> deprivation of a right or privilege as a citizen of the United States resulting from actions in the furtherance of the conspiracy.
>
> Griffin v. Breckenridge, supra at 102-103.

The Supreme Court did not, however convert §1985(3) into a general federal tort law:

> That the statute was meant to reach private action does not, however, mean that it was intended to apply to all tortious, conspiratorial, interferences with the rights of others. For supporters of the legislation insisted on coverage of private conspiracies, they were equally emphatic that they did not believe, in the words of representative Cook, that Congress has a right to punish an assault and battery when committed by two or more persons within a state. The Constitutional shoals that would lie in the path of interpreting section 1985(3) as a general federal tort law can be avoided by getting full effect to the congressional purposes - by requiring, as an element of the cause of action, the kind of

> invidously discriminatory motivation stressed by the sponsers of the limiting amendment... The language requiring intent to deprive of equal protection, or equal privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirator's action. The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all.

Griffin v. Breckenridge, supra at 101-102. It is apparent that the Supreme Court considered the requirement of "racial or perhaps otherwise class-based, invidiously discriminatory "animus" to be the critical factor in preventing the use of §1985(3) as a general tort law.

b. Three issues emerged from Griffin which required further clarification by the lower courts:

> 1. The Griffin Court recognized that it was difficult to conceive of private action

which constitutes a "deprivation of the equal enjoyment of rights secured by the law to all." Griffin v. Breckenridge, supra at 102. This concept requires further elucidation.371/

2. Griffin involved and was determined on the basis of racial discrimination. The Supreme Court specifically declined to determine whether a conspiracy motivated by invidiously discriminatory intent other than racial bias would be actionable under §1985(3). Griffin v. Breckenridge, supra n.9 at 102.

3. In upholding the constitutionality of §1985(3) in Griffin, the Supreme Court relied on §2 of the Thirteenth Amendment, and Congress' power to protect the right to interstate travel. The Supreme Court did not determine what additional sources of congressional authority, if any, would support the constituionality of §1985(3) with respect to private conspiracies. The Supreme Court did make it clear, however, that some source of congressional authority must be relied upon in every case of private conspiracy arising under §1985(3). Griffin v. Breckenridge, supra at 104-107.

c. The United States Court of Appeals for the Fifth Circuit has recently addressed the issue of what constitutes deprivation of equal protection of the laws:

> For assistance in determining what a private deprivation of the enjoyment of legal rights entails, we turn to a passage in United States v. Harris which was cited by the Griffin Court:
>
> > A private person cannot make constitutions or laws, nor can he with authority construe them, nor can he administer or execute them. The only way, therefore, in which one private person can deprive another of the equal protection of the laws is by the commission of some offense against the laws which protect the rights of persons, as by theft, burglary, arson, libel, assault, or murder.
>
> The Court through this passage is making clear that the inquiry must initially

> concentrate on the legality of the defendants' activity apart from section 1985(3). If the object of the defendants' conspiracy did not include a violation of some law (independent of section 1985(3) itself) which protects the plaintiff, the conspiracy could not have deprived the plaintiff of the "protection of the laws". Put more simply, there can only be a deprivation of the rights of a plaintiff when the action of the defendants is otherwise illegal. If the defendants have not conspired to act contrary to law, an object of a section 1985(3) conspiracy has not been made out and the section is inoperable, regardless of whether the legal rights of the plaintiff are somehow affected. On the other hand, if the defendants have indeed conspired to act contrary to law, the inquiry shifts to whether such conduct was motivated by a class based bias.

McLellan v. Mississippi Power & Light Co., 545 F.2d 919, 925-926 (5th Cir. 1977); Compare with O'Neill v. Grayson

Co.Hospital, 472 F.2d 1140 (6th Cir. 8973); Place v. Shep[illegible], 446 F.2d 1239, 1246 (6th Cir. 1971); Lopez v. Arrowhead Ranches, 529 F.2d 924 (9th Cir. 1975). The Court finds the rationale of the Fifth Circuit to be persuasive in this regard and concludes that the object of a §1985(3) conspiracy must be the deprivation of another's enjoyment of legal rights by independently unlawful conduct. 372/

d. A split in authority has emerged in the wake of Griffin as to whether non-racial class-based invidious discrimination is actionable under §1985 (3). Compare e.g. Gleason v. City of Louisville 518 F.2d 899 (6th Cir. 1975) cert. denied, 423 U.S. 930 (1976); Lopez v. Arrowhead Ranches, supra; Harrison v. Brooks, 519 F.2d 1358 (1st

Cir. 1975); Bellamy v. Mason's Stores, Inc., 508 F.2d 504 (4th Cir. 1974); Arnold v. Tiffany, 487 F.2d 286 (9th Cir. 1973); Action v. Gannon, 450 F.2d 1227 (8th Cir. 1971); Richardson v. Miller 446 F.2d 1247 (3d Cir. 1971); Puentes v. Sullivan, 425 F.Supp. 249 (W.D. Tex. 1977); Heyn v. Board of Suprs. of La. State Univ., 412 F.Supp. 603 (E.D. La. 1976); Western Telecasters v. California Fed. of Labor, 415 F.Supp. 30 (S.D. Cal. 1976). However, the United States Court of Appeals for the Sixth Circuit has spoken frequently in determining this issue in the affirmative. In Azar v. Conley, 456 F.2d 1382 (6th Cir. 1976); Crabtree v. Brennan, 466 F.2d 481 (6th Cir. 1972), and O'Neill v. Grayson Co. Hospital, supra, the Sixth Circuit recognized sub silentio that a cause

of action under §1985(3) existed for non-racial class based invidious discrimination. Finally, in Cameron v. Brock, 473 F.2d 608, 609 (6th Cir. 1973), the Sixth Circuit held:

> The most recent authoritative explication of the requirements of a §1985(3) suit was set out by the Supreme Court in Griffin v. Breckenridge, 403 U.S. 88, 91 S.Ct. 1790, 29 L.Ed. 2d 338 (1971).
>
> * * *
>
> The Court held that the conspiracy's intent to deprive a person or class of persons of their rights must be invidiously discriminatory. The Court, expressly declined to rule on whether non-racial discrimination might be such invidious discrimination. In an earlier decision, however, the Court at least implied that class-based non-racial discrimination would be actionable. Snowden v. Hughes, 321 U.S. 1, 11, 64 S.Ct. 397, 88 L.Ed. 497 (1944). It should also be noted that the words of the statute itself make no reference to a requirement of racial discrimination.

> This court recently found sufficient an allegation under §1985(3) that a single family was deprived of the equal protection of the law. Azar v. Conley, 456 F. 5d 1382 (6th Cir. 1972). No racial discrimination was involved in the Azar case. See also Harrison v. Brooks, 446 F.2d 404, 407 (1st Cir. 1971).
>
> We hold that §1985(3)'s protection reaches clearly defined classes, such as supporters of a political candidate. If a plaintiff can show that he was denied the protection of the law because of the class of which he was a member he has an actionable claim under §1985(3).

This holding has been reaffirmed by the Sixth Circuit in many subsequent decisions, e.g. Ohio Inns. Inc. v. Nye, 542 F.2d 673 (6th Cir. 1976) cert. denied ____U.S.____; Timson v. Wright, 532 F.2d 552 (6th Cir. 1976); Gleason v. City of Louisville, supra, and is in accordance with the decisions of other courts which have addressed this issue.

E. g. Richardson v. Miller, supra; Puentes v. Sullivan, supra.

e. In addition to recognizing that non-racial class-based invidious discrimination is actionable under §1985 (3), the Sixth Circuit has adopted a liberal view as to the "class" requirement of such discrimination. In Azar v. Conley, supra, the Sixth Circuit recognized a "class" consisting of eight members of a family for purposes of §1985 (3). In doing so, the court noted:

> It is not unreasonable, therefore, to assume that the protection of Section 1985(3) extends not only to blacks and other racial minorities but to any person or group that is the object of invidious discrimination.

Azar v. Conley, supra n. 5 at 1386-1387 (emphasis in text). This liberal approach was reaffirmed in Cammeron v. Brock, supra at 609:

> We hold that §1985(3)'s protection reaches clearly defined classes, such as supporters of a political candidate. If a plaintiff can show that he was denied the protection of the law because of the class of which he was a member, he has an action claim under §1985(3).

It is clear, therefore, that under Azar and Cameron[373/] any definable group that is the object of discrimination will satisfy the "class-based, invidiously discriminatory animus" element of §1985 (3). Griffin v. Breckenridge, supra at 102.[374/]

f. The Circuits have split with respect to expanding Congress' authority to reach private conspiracies under §1985 (3) beyond the parameters set forth in Griffin. Compare e.g. Glasson v. City of Louisville, supra; Action v. Gannon, supra. Richardson v. Miller, supra; with Murphy v. Mount Carmel High School,

543 F.2d 1189 (7th Cir. 1976); Bellamy v. Mason's Stores Inc., supra; Heyn v. Board of Suprs. of La. State Univ., supra. The central issue of this controversy is whether the Fourteenth Amendment constitutes a sufficient source of Congressional authority to reach private conspiracies under §1985(3). Although this issue is most interesting, the Court need not address it at this time. Any "independently unlawful conduct" on the part of the defendants in this case necessarily involves a violation of the provisions of the LMRDA, which was promulgated under Congress' express authority to regulate interstate travel and commerce. This source of congressional authority was expressly recognized in Griffin as being sufficient to reach private conspiracies under §1985(3).

g. Defendants[375/] have conspired to deprive plaintiff of his rights under the LMRDA, 29 U.S.C. §§1985, 411, 501, 529, by reason of plaintiff's status and activities as a member of the dissident faction of Local 18 in violation of 1985 (3). Defendants conduct toward plaintiff has been part and parcel of a pattern and practice of similar conduct directed at the entire dissident faction in a concerted effort to suppress and destroy the dissident movement. This pattern of conduct has been manifested in a series of unlawful overt acts[376/] directed at plaintiff and other dissidents which suffices to establish class-based invidiously discriminatory animus on the part of defendants.

E. STATUTES OF LIMITATION

111a. Defendant has asserted that

plaintiff's various federal claims are barred by limitations.

b. The Court need not address this assertion insofar as plaintiff's claims under 29 U.S.C. §§411, 501 are concerned. Since defendants did not plead the statue of limitations as a defense to plaintiff's §411 claims in their initial responsive pleadings, such defense is deemed waived.[377/] See e.g. Senter v. General Motors Corp., 532 F.2d 511 (6th Cir. 1976) cert. denied ____U.S. _____, 97 S. Ct. 1897 (1976); Crawford v. Zeitler, 326 F.2d 119 (6th Cir. 1964); Bongratz v. W.L. Belvidere, Inc. 416 F. Supp. 27 (N.D. Ill. 1976). Nor need the Court determine the limitations period applicable to plaintiff's §501 claim. Although plaintiff has established a violation of this section, he is left

exclusively to his state remedies in this regard and federal limitations are, therefore, irrelevant.

c.1. With respect to plaintiff's claims under 29 U.S.C. §§185, 529, the LMRDA does not contain a statue of limitation, and therefore the Court must look to the laws of Ohio as the state in which this litigation arose. E.g. U.A.W. v. Hoosier Corp., 388 U.S. 696 (1966); Sewell v. I.A.M.I, 445 F.2d 545 (5th Cir. 1971) cert. denied 404 U.S. 1024 (1972). In this regard, the Court may consider several alternative periods set forth in the Ohio Revised Code: O.R.C. §2305.09 - four years; O.R.C. §2305.10 - two years; O.R.C. §2305.07 - six years; O.R.C. §2305.11 - one year; O.R.C. §2305.12 - ten years; O.R.C. §2305.14 - ten years.

2. The case of Sewell v. I.A.M.,

supra, is instructive in determining the applicable statue of limitations. In Sewell the court held a claim propounded under the LMRDA to be barred by an Alabama statute of limitations of one year, which provided in pertinent part:

> The following must be commenced within one year:
>
> Actions for any injury to the person or rights of another, not arising from contract, and not herein specifically enumerated.

The Alabama statute bears a marked resemblence to O.R.C. §2305.09, which provides in pertinent part:

> An action for any of the following causes shall be brought within four years after the cause thereof occurred:
>
> * * *
>
> (D) For an injury to the rights of the plaintiff not arising on contract nor enumerated in sections 2305.10 to 2305.12, inclu-

sive, 2305.14 and 1304.29 of the Revised Code.

The Court finds the rationale of Sewell and the similarity of the statutes to be persuasive and concludes that O.R.C. §2305.09 is applicable to plaintiff's §§185, 529 claims. In this regard, any violation of plaintiff's rights must have taken place within four years of the commencement of this action, December 21, 1973.[378/] As plaintiff did not even enter the rebel ranks until 1970, and incurred no injury or damage prior thereto, his claims accrued within the applicable four year limitation period.

d.1. The Civil Rights Act of 1871, of which 42 U.S.C. §1985(3) is a part, is similar to the LMRDA in the respect that it also does not contain a general statute of limitations. The Court, therefore, must again look to the

most analogous state law for guidance. E.g. Austin v. Brammer, 555 F.2d 142 (6th Cir. 1977); Mason v. Owens-Illinois, Inc., 517 F.2d 520 (6th Cir. 1975); Krum v. Sheppard, 407 F.2d 490 (5th Cir. 1967). Actions under 42 U.S.C. §1985(3) sound in conspiracy and, within the context of this case, presents the Court with several possible limitations periods: O.R.C. §2305.09 - four years; O.R.C.§2305.07 - six years; O.R.C. §2305.14 - ten years. The Court need not resolve this issue, however, for even under the most restrictive limitation period, four years, plaintiff's action has been timely filed.

2. There is no question that a statute of limitations may be successfully interposed as a defense to a conspiracy action. The problem surrounding this defense concerns the accrual date

of the action. Although the Court looks to the most analagous Ohio law with regard to the time in which a civil rights action may be brought, the accrual date of such action is determined solely by federal law. E.g. Mitchell v. Hendricks, 431 F.Supp. 1295 (E.D. Pa. 1977). "Federal law holds that the time of accrual is when plaintiff knows or has reason to know of the injury which is the basis of the action." Cox v. Stanton, 529 F.2d 47, 50 (4th Cir. 1975) citing Young v. Clicherfield R.R. Co., 288 F.2d 499, 503 (4th Cir. 1961). By way of comparison, Ohio has taken a somewhat divergent view with respect to accrual dates, but is in accord with the federal position insofar as conspiracy is concerned. In Ohio, it has been held that limitations begin to run from the last

overt act done in furtherance of the conspiracy, from the last overt act causing damage to the plaintiff, and from each overt act causing damage.[379/] However, conspiracy, in and of itself, is not recognized as giving rise to a civil action:

> Conspiracy, in and of itself, furnishes no cause of civil action. The gist of the civil action for conspiracy is the damage caused by acts committed pursuant to a formed conspiracy, rather than the conspiracy itself; and unless something is actually done by one or more of the conspirators which proximately results in damage, no civil action lies against anyone.

Minarik v. Nagy, 8 O.App. 2d 194, 196, 193 N.E. 2d 280, 281 (8th Dist. 1963) dism'd for want of debate 176 O.St. 326, 199 NE 2d 404 (1964) quoting 10 O.Jur 2d, Conspiracy §3; see also Psarras v. Bateman, C 76-23 (Memorandum Opinion and

Order, N.D. Ohio January 31, 1978); Pumphrey v. Quillen, 102 O.App. 173, 141 N.E. 2d 675 (9th Dist. 1955) aff'd 165 O.St. 343, 135 N.E. 2d 328 (1956). As a cause of action for conspiracy arises only upon the infliction of damage, the occassion of such damage is the earliest possible accrual date under any Ohio theory of accrual.

3. In the present case plaintiff did not become a rebel member until 1970. Consequently, any damage incurred by plaintiff as a result of a conspiracy against plaintiff as a member of the dissident faction was incurred in 1970 or thereafter -- well within the four year provisions of O.R.C. §2305.09. Accordingly, the Court need not determine the state statute of limitations most analagous to plaintiff's §1985(3)

claims, for plaintiff's claim was timely filed in any event.[380]/

F. PENDANT CLAIMS

112. Plaintiff has alleged eight pendant state claims: assault and battery; breach of contract, tortious interference with associational rights; breach of fiduciary duty; conspiracy; abuse of process, defamation, and, malicious interference with contract rights. Initially, plaintiff has failed to adduce any evidence in support of his claims of abuse of process and defamation. Further, plaintiff's claim for malicious interference with contract rights appears to be included within plaintiff's claim for breach of contract. Accordingly, the Court renders judgment in favor of defendants as to plaintiff's claims of abuse of process, and defamation, and

will consider plaintiff's claim for malicious interference of contract rights within the context of his claims for breach of contract. The Court will address the remainder of plaintiff's pendant claims in the order in which they appear.381/

113. Defendants, through the actions of their agents, have committed assault and battery upon plaintiff in conjunction with the state meetings of 1970 and 1972.382/ E.g. Shimman v. Grothaus, supra. Plaintiff's claim in this regard is not barred by the operation of O.R.C. §2305.01 as defendants wrongfully, and until the trial of this case successfully, concealed their participation in said tortious conduct despite the due diligence of plaintiff in attempting to discover all participants

in said conduct. See e.g. Glus v. Brooklyn Eastern District Terminal, 359 U.S. 231 (1959); Ott v. Midland-Ross Corp., 523 F.2d 1367 (6th Cir. 1975); Dayco Corp. v. Goodyear Tire and Rubber Co., 523 F.2d 389 (6th Cir. 1975); McCampbell v. Southard, 62 O.App. 339, 23 NE 2d 954 (9th Dist. 1937).383/

114a. The constitution and by-laws of a labor organization become the terms and provisions of a binding contract between a union and its members which is entered into upon such members acceptance into the union. See e.g. IAM v. Gonzalez, 356 U.S. 617 (1958); Cleveland Orchestra Committee v. Cleveland Federation of Musicians, 303 F.2d 229 (6th Cir. 1962); Campbell v. Bro. of Railroad Trainmen, 4 O.App. 2d 81, 212 N.E. 2d 650 (8th Dist. 1965); Armstrong v. Duffy,

90 O.App. 233, 103 N.E. 2d 760 (7th Dist. 1952). Under such a contract the union and members must comply with the provisions of the constitution and by-laws in their dealings with each other. E.g. Campbell v. Bro. of Railroad Trainmen, supra. Defendants have breached this contract with plaintiff by disciplining plaintiff in violation of the terms and provisions of Local 18's By-laws.[384/] Plaintiff's claim for breach of contract clearly fall within the provisions of O.R.C.§2305.07 and is therefore brought within the limitations period.

b. Plaintiff further asserts that this contract has been breached by defendants prosecution of plaintiff for the theft of the election control list. In support of this allegation, plaintiff submits that the offense for which he

was charged was not included in the By-laws until after the violation occurred. Plaintiff relies on the case of Armstrong v. Duffy, supra, as authority for the proposition that "a union member cannot be guilty of the violation of a provision of a contract which was not in existence at the time the alleged offense was committed." The Court, however, finds that the charges preferred against plaintiff were sufficient to sustain his conviction for the theft of the control list. Hardeman v. Boilermakers, supra.

115.a. Plaintiff asserts that "defendants have tortiously interfered with his associational rights as a member in Local 18 by wrongfully suspending him from membership and otherwise disciplining him."385/ In support of this proposition plaintiff cites Taylor v.

Favarito, 48 O.L. Abs. 524, 74 N.E. 2d 768 (8th Dist. 1947), which held that labor unions must afford their members the complete protection of the rules set forth in its constitution and by-laws regarding the enforcement of any disciplinary measures taken against such members. The holding in Taylor, however, is based upon the implied contract which exists between a union and its members, and not on tortious interference with associational rights.

b. Further, any interference in plaintiff's associational rights would be actionable only to the extent that plaintiff had been disciplined in breach of his contractual rights. Plaintiff would not be entitled to redress if he was properly disciplined, regardless of the effect on his associational rights. In effect, plaintiff is attempting to twice

recover on a single cause of action by styling it ex contractu and ex delicto. Plaintiff's recovery is limited to his contract claim, as discussed by the Court above.386/

116. The officers of a labor organization owe a fiduciary duty to the membership in the handling of membership funds and assets387/ which is analagous to that imposed upon officers and directors of corporations. See State v. Local 5760, USE, 172 Ohio St. 75, 173 N.E. 2d 331 (1961). Property accumulated by local labor unions from contributions made by individual members effectively constitutes a trust fund for the benefit of those members, and though legal title may be vested in officers, such ownership is of a trust character and must be exercised for the use and benefit of the

membership. Cf. Bozeman v. Fitzmaurice, 62 O.L. Abs. 526, 197 N.E. 2d 627 (8th Dist. 1952); See Huntsman v. McGovern, 56 O.L. Abs. 170, 91 N.E. 2d 717 (Com. Pl., Muskingum Co. 1950). Defendant Possehl has violated his fiduciary duty as an officer of Local 18 by diverting union funds for the payment of legal fees in defense of civil and criminal actions brought by plaintiff and other dissidents against agents of the defendants. Plaintiff is entitled to sue, on behalf of the membership, for the return of such funds to the union treasury[388/] plaintiff's cause of action in this regard falls within O.R.C. §2305.09 and has been brought within the limitations period.

117. "Conspiracy" has been defined as a combination of two or more

persons seeking by concerted actions to accomplish some criminal or unlawful purpose, or some purpose not in itself criminal or unlawful by criminal or unlawful means. See e.g. State ex rel Chalfin v. Glick, 113 Ohio App. 23, 177 N.E. 2d 293 (3d Dist. 1960) aff'd 172 Ohio St. 249, 175 N.E. 2d 68 (1961). The Court finds that defendants have conspired to injure plaintiff through the prepetration of various unlawful acts in violation of plaintiff's rights under federal and state law as previously set forth herein. Plaintiff's action is not barred by limitations.389/

G. LIABILITY, DAMAGES, INJUNCTIVE RELIEF

118a. Defendants Local 18, Possehl, and Frank are jointly and severally liable to plaintiff for violations

of plaintiff's rights under 29 U.S.C. §411, 529. See e.g. Tomko v. Hilbert, 288 F.2d 625 (3d Cir. 1961); Sipe v. Local 191, Carpenters and Joiners, 393 F.Supp. 865 (M.D.Pa. 1975); Vincent v. Plumbers and Steamfitters, Local 198, 384 F.Supp. 1379 (M.D. La. 1974); Eisman v. Balt. Reg. Joint Bd. of Amalgamated Cloth Wkrs., supra; Talavera v. Int. Bro. of Teamsters, Local 85, 351 F.Supp. 155 (N.D. Cal. 1972); Pignotti v. Local 3, Sheet Metal Wkrs., 343 F.Supp. 236 (D.Neb. 1972) aff'd 477 F.2d 825 (1973) cert. denied 414 U.S. 1067 (1973); White v. King, 319 F. Supp. 122 (E.D. La. 1970); Cole v. Hall, 35 F.R.D. 4 (E.D.N.Y. 1964); 29 U.S.C. §412. In this regard, defendants Possehl and Frank are not liable to plaintiff in their private capacity for individual

torts inflicted upon plaintiff, but are individually liable for violating plaintiff's protected rights while acting under color of and in abuse of their authority as union officials. Id. Plaintiff's complaint clearly names these defendants in their official as well as individual capacity and plaintiff is entitled to relief thereunder.

b. Defendant Local 18 is liable to plaintiff for breach of its duty of fair representation as prescribed by 29 U.S.C. §185. The liability encompasses liability for the acts of its officers and agents which furthered this breach of duty.390/

c.1. Defendants Possehl and Frank are jointly and severally liable to plaintiff for having conspired to deprive plaintiff of the equal protection of the

laws in violation of 42 U.S.C. §1985(3). See e.g. Birnbaum v. Trussel, 347 F.2d 86 (2d Cir. 1965). Defendant Local 18 is not a "person" within the context of §1985(3), and therefore is not directly liable to plaintiff under this section. Plaintiff asserts that Local 18 is responsible for the actions of its officers and agents and therefore is nonetheless indirectly liable to him under §1985(3). The Court agrees, albeit not for plaintiff's expressed reasons.

2. Plaintiff has cited no authority for his assertion, nor has the Court discovered any case in point. Therefore, some analogy to other §1985 (3) principles is required. Corporate and labor organizations have been found liabile under §1985(3) for conspiring with other persons or organizations to

deprive an individual of his civil rights. See e.g. McLellan v. Mississippi Power and Light, supra; Clark v. Universal Builders, Inc., 409 F.Supp. 1274 (N.D.Ill. 1976). The courts have split, however, as to the question of whether officials of a single corporation can conspire with one another for purposes of §1985(3). Beaman v. W.B. Saunders Co., 413 F.Supp. 1167, n.11 at 1176 (E.D.Pa. 1976). As a general rule, in actions under §1985(3) there is no vicarious liability on the part of superior officials for the actions of their subordinates unless the superior actually directed or participated in the alleged violation of plaintiff's civil rights. E.g. Westinghouse Broadcasting Co. v. Dunkakis, 409 F.Supp. 895 (D. Mass. 1976). The application of this

principal as to bind a corporation or labor organization under §1985(3) for the acts of its officers or agents requires the determination of such factors as the number of acts of discrimination and the number of business entities, or individuals involved. Beamon v. W.B. Saunders Co, supra. If a clear and consistent pattern of offensive conduct emerges from this analysis, a corporation or union would then be liable under §1985 (3) even though the sole participants in the conspiracy were officials or agents of the corporation or union itself. This principal is recognized even by those courts which have held that a corporation cannot conspire with itself. In Dombrowski v. Dowling, 459 F.2d 190 (7th Cir. 1972), the court held:

> We also believe that the statutory requirement that "two or more

> persons...conspire or go in disguise on the highway," is not satisfied by proof that a discriminatory business decision reflects the collective judgment of two or more executives of the same firm. We do not suggest that an agent's action within the scope of his authority will always avoid a conspiracy finding. Agents of the Klan certainly could not carry out acts of violence with impunity simply because they were acting under orders from the Grand Dragon. But if the challenged conduct is essentially a single act of discrimination by a single business entity, the fact that two or more agents participated in the decision or in the act itself will normally not constitute the conspiracy contemplated by this statute. Cf. Morrison v. California, 291 U.S. 82, 92, 54 S. Ct. 281, 78 L.Ed. 664. In this case we believe the evidence fails to establish this element of a §1985(3) violation.

Under such circumstances the corporation or union effectively ratifies and adopts the actions of its officials and/or agents. Cf. Beamon v. W.B. Saunders Co. supra; Shimman v. Grothaus, supra. In

the present case the evidence establishes that defendants Possehl and Frank have conspired to, and have undertaken a concerted effort to suppress plaintiff and the dissident movement. To this end these defendants have engaged in many overt acts involving various individual of Local 18, and taking place over a protracted period of time. Further, during the course and scope of this conspiracy these defendants were repeatedly re-elected to their positions as officers of Local 18. The Court finds such evidence sufficient to hold Local 18 vicariously liable for the actions of Possehl and Frank and concludes that these defendants are jointly and severally liable to plaintiff for violations of 42 U.S.C. §1985(3).

d. Defendant Local 18 is liable

to plaintiff for breach of the implied contract between a union and its members. See Campbell v. Bro. of Railroad Trainmen, supra.

e. Defendant Possehl is liable for breach of his fiduciary duty to fairly and properly manage the funds of Local 18.391/

f. Defendants are jointly and severally liable to plaintiff for assault and battery and for conspiring to injure plaintiff in violation of federal and state law. See Shimman v. Grothaus, supra.

119a. Defendants are jointly and severally liable to plaintiff for all compensatory damages proximately resulting from defendants violations of 29 U.S.C. §§411, 529. See e.g. Kuebler v. Cleveland Lithographers & Photo. U.

Loc. 24-P, supra; McCraw v. United Assn. of Journey. & App. of Plumbing, supra; Cooke v. Orange Belt Dist. Council of Painters, supra; Boilermakers v. Brasswell, 388 F.2d 193 (5th Cir. 1968) cert. denied 391 U.S. 935 (1968); Talavera v. Int. Bro. of Teamsters, supra; Robin v. Schonfeld, supra; White v. King, supra; Kelsey v. Loc. 8, Int. Alliance of Theatrical Stage Emp., 294 F.Supp. 1368 (E. D. Pa. 1968) aff'd 419 F.2d 481 (3d Cir. 1969) cert. denied 397 U.S. 1064 (1970); Sands v. Abelli, 390 F.Supp. 677 (S.D.N. Y.) 1968). In this regard, plaintiff is entitled to damages for loss of wages and employment opportunity, e.g. Kuebler v. Cleveland Lithographers & Photo U. Local 24-P, supra; McGraw v. United Assn. of Journey & App. of Plumbing, supra; Keefe Bros. v. Int. Bro. of Teamsters,

Local 592, supra; humiliation and injury to reputation, e.g. Bradford v. Textile Wkrs. of America, supra; Keefe Bros. v. Int. Bro. of Teamsters, Local 592, supra; Talvera v. Int. Bro. of Teamsters, supra; Robin v. Schonfeld, supra,[392/] and emotional and mental distress, Id; Boilermakers v. Rafferty, supra.[393/]

b. There is a split among the courts as to whether punitive damages are available for violations of 29 U.S.C. §411.[394/] Compare McCraw v. United Assn. of Journey and App. of Plumbing, supra; Nix v. Fulton Lodge No. 2., IAM, 262 F.Supp. 1000 (N.D. Ga. 1967) modified 415 F.2d 212 (1969) cert. denied 406 U.S. 946 (1972); Magelssen v. Local 518, Operative Plasterers and Cement Masons Int. Assn., 240 F.Supp. 259 (W.D. MO. 1965); Burris v. Int. Bro. of Teamsters,

224 F.Supp. 277 (W.D.N.C. 1963) with Bradford v. Textile Wkrs. of America, supra; Morrissey v. National Maritime U. of America, supra; Cooke v. Orange Belt Dist. Council of Painters, supra; Boilermakers v. Braswell, supra; Sipe v. Local 191, Carpenters, supra; Robin v. Schonfeld, supra. The United States Court of Appeals for the Sixth Circuit, in McCraw v. United Assn. of Journey. & App. of Plumbing, supra at 710, found punitive damages to be inappropriate in actions under 29 U.S.C. §411:

> With respect to his claim for damages, McCraw complains of the ruling of the District Judge that since the lawsuit was founded upon a violation of Section 411 (a), Title 29 United States Code, and was brought pursuant to Sections 411(a) and 412, it was not a common law action for damages and damages would be limited to those which directly and proximately resulted from the alleged violation of the Act on July 1, 1961, the date of the

suspension of McCraw from membership. In accordance with this ruling, no consideration was given to loss of employment claimed by McCraw by reason of alleged discrimination prior to July 1, 1961. The District Judge found that the evidence failed to establish that McCraw was discriminated against after June 1961 or that he sustained any loss of employment after July 1, 1961, by reason of discrimination on the part of the union. He also pointed out that even if such discrimination were established, any loss from unemployment by reason of discrimination would be wholly a matter of conjecture since it appeared from the record that there was a substantial unemployment in the trade within the Chatanooga area at that time.

Proceeding on the same theory, the District Judge also ruled that since McCraw, as a suspended member of the Local Union, had no right to attend the union meeting, it was proper for the union to ask him to leave the meeting room. He found as a fact that the force and means used for McCraw's removal did not appear to have exceeded what was reasonable and necessary to accomplish the purpose, considering his refusal to voluntarily leave and his resistence to being moved. According-

> ly, the injury to his thumb was caused by his improper physical resistence to being excluded from the union meeting at a time when he was suspended, and was not a direct and proximate result of a violation of Section 411(a), Title 29 United States Code.
>
> We concur in the rulings of the District Judge with respect to the claim for damages.

With all deference to the Sixth Circuit, the Court in McCraw analogized §411 to the common law in determining that punitive damages were unavailable, rather than focusing upon the provisions of 29 U.S.C. §412 and the legislative intent of Congress in enacting The Bill of Rights. This latter approach was employed by the United States Court of Appeals for the Fifth Circuit in Boilermakers v. Braswell, supra at 200:

> The jurisdictional provision, Section 412, permits the granting of "such relief*** as may be appropriate." We do not agree

> with the court in Cole v. Hall that the use of the word "relief" necessarily rules out punitive damages which are strictly speaking not in the nature of relief. We feel it to be appropriate therefore to look to the purposes of LMRDA, and particularly the "Bill of Rights" section to determine whether the granting of punitive damages would serve to best effectuate those purposes.
>
> In the statutory statement of findings and purposes of LMRDA Congress declares that there are instances of unions' "disregard of the rights of individual employees" and that it "is necessary to eliminate or prevent improper practices on the part of labor organizations**" 29 U.S.C. §401. The awarding of punitive damages in appropriate cases serves as a deterrent to those abuses which Congress sought to prevent.

The Fifth Circuit went on to quotewith approval the New York Supreme Court, Appellate Division in Fittpaldi v. Legassie, 18 A.D. 2 331, 239 N.Y.S. 2d 792, 796:

> Strong reasons of policy promote the use of exemplary damages to

> deter union officials from conduct designed to suppress the rights of members to a fair and democratic hearing on legitimate disciplinary charges. The very basis for the existence of unionism in our society today is the promise of employment to those who desire to associate freely in order to obtain it. The right of the working man to the benefits of collective bargaining is too essential and valuable to be hindered, impeded and seriously damaged by irresponsible and dictatorial leaders whose dominance in any given situation does great disservice to the purpose and principles of unionism. When that right of free association is usurped by a concerted malicious effort to deprive the individual of the safeguards built into the organization, it cannot be condoned.*** Imposition of exemplary damages, when the requisite elements of malice, gross fraud, wanton or wicked conduct, violence or oppression are present, serves to achieve the deterrence they were designed to effect.

The Fifth Circuit's holding in Braswell constitutes the majority view, and has been approved by the Second Circuit, Morrissey v. National Maritime U. of

America, supra, and the Ninth Circuit, Cooke v. Orange Belt Dist. Council of Painters, supra. Additionally, punitive damages have been awarded in actions brought under 29 U.S.C. §529 to redress violations of §411. E.g. Cooke v. Orange Belt Dist. Council of Painters, supra; Robin v. Shonfeld, supra; Sands v. Abelli, supra. As was discussed previously,[394/] the enforcement mechanism of §412 is broader in scope and authority than §529.

c. Although the Court finds itself in agreement with the more recent holdings of Braswell, Cooke, and Morrissey, it nonetheless is bound by the Sixth Circuit's ruling in McCraw and concludes that plaintiff is not entitled to punitive damages for defendants' violations of 29 U.S.C. §411.

120. Defendant Local 18 is liable

to plaintiff for all compensatory damages proximately resulting from the breach of its duty of fair representation under 29 U.S.C. §185. See e.g. Vaca v. Sipes, supra; Dill v. Greyhound Corp., 435 F.2d 231 (6th Cir. 1970) cert. denied 402 U.S. 952 (1971); IBEW v. A-1 Elec. Service, Inc., 535 F.2d 1 (10th Cir. 1976); DeArroyo v. Sindicato de Trajabadores Packinghouse, 425 F.2d 281 (1st Cir. 1970) cert. denied 400 US 877 reh. denied 400 US 953. Punitive damages and damages for mental distress are available in suits under §185 only where the union has acted in an outrageous and malicious fashion in breaching its duty of fair representation. Emmanuel v. Omaha Carpenters Dist. Council, supra; Bond v. Local 823, Int. Bro. of Teamsters, 521 F.2d 5 (8th Cir. 1975); Butler v. Local

823, Int. Bro. of Teamsters, 514 F.2d 442 (8th Cir. 1975); cert. denied 423 U.S. 924 (1975); Richardson v. Communications Wkrs. of Am., 443 F.2d 974 (8th Cir. 1971); Tippitt v. Liggett Meyers Tobacco Co., 316 F.Supp. 292 (M.D.N.C. 1970); Patrick v. I.D. Packing Co., 308 F.Supp. 821 (S.D. Iowa 1969). This is such a case. Plaintiff is entitled to damages for mental distress, and punitive damages from defendant Local 18 for its violation of 29 U.S.C. §185.

121. Defendants are jointly and severally liable to plaintiff for all compensatory damages proximately resulting from defendants violation of 42 U.S.C. §1984(3). See e.g. Stengel v. Belcher, 522 F.2d 438 (6th Cir. 1975); Glasson v. City of Louisville, supra; Schiff v. Williams, 519 F.2d 257 (5th

Cir. 1975); Hernandez v. Erlenbersh, 368 F.Supp. 752 (D. Ore. 1973); Wilson v. Prasse, 325 F.Supp. 9 (W.D. Pa. 1971) aff'd 463 F.2d 109 (1972); Rhoads v. Horvat, 270 F.Supp. 307 (D.Colo. 1967). Such damages include out-of-pocket expenses, humiliation, embarassment, emotional and mental distress, and pain and suffering. See e.g. Glasson v. City of Louisville, supra; Wilson v. Prasse, supra; Rhoades v. Horvat, supra. Additionally, plaintiff is entitled to punitive damages from defendants for their intentional, willful, and malicious violation of 42 U.S.C. §1985(3). Cf. Stengel v. Belcher, supra; see e.g. Hernandez v. Erlenbusch, supra; Wilson v. Prasse, supra; Rhoads v. Horvat, supra; Tracy v. Robbins, 40 F.R.D. 108 (D.S.C. 1966) appeal dismd 373 F.2d 13

(1967).

122. Defendants are jointly and severally liable to plaintiff for all compensatory damages proximately resulting from the assault and battery of plantiff at the hands of defendants' agents. E.g. Shimman v. Grothaus, supra. These damages include out-of-pocket expenses, pain and suffering, humiliation, and mental distress. Id. plaintiff also is entitled to recover punitive damages from defendants for such assault and battery. Id.

123. Defendant Local 18 is liable to plaintiff for all compensatory damages proximately resulting from its breach of the implied contract between a union and its members. See e.g. T.&M v. Gonzalez, supra; cf. Armstrong v. Duffy, supra; Crossen v. Duffy, supra.

124. Defendant Possehl is liable in damages, payable to the treasury of Local 18, in an amount equal to the funds diverted from Local 18's treasury for payment of legal fees in defense of civil and criminal actions brought by plaintiff and other dissidents.

125. Defendants are jointly and severally liable to plaintiff for all compensatory damages proximately resulting from the overt acts perpetrated by defendants and/or their agents in furtherance of defendants conspiracy to injury and suppress plaintiff in retaliation for his status and activities as a member of the dissident faction of Local 18. See generally, 30 O.Jur. 2d §§3, 30. Defendants are further liable to plaintiff for punitive damages due to the intentional, willful, and mali-

cious fashion in which defendants perpetrated and carried out said conspiracy. See e.g. Columbus Finance, Inc. v. Howard, 42 Ohio St.2d 178, 327 N.E. 2d 654 (1975); Housh v. Peth, 165 Ohio St. 35, 133 N.E. 2d 340 (1956).

126. Plaintiff is entitled to injunctive relief with respect to defendants' violations of 29 U.S.C. §§411, 529, e.g. Kuebler v. Cleveland Lithographers and Photo. U. Loc 24-P, supra; Boilermakers v. Rafferty, supra; Gleason v. Chain Service Restaurant, supra; 29 U.S.C. §185, e.g. Vaca v. Sipes, supra; DeArroyo v. Sindicato de Trobajadores Packinghouse, supra; and 29 U.S.C. §1985 (3), e.g. Action v. Gannon, supra; Mizell v. North Broward Hospital District, 427 F.2d 468 (5th Cir. 1970). Plaintiff is also entitled to injunctive relief

with respect to his pendant claims of assault and battery, breach of implied contract, and conspiracy. See generally Armstrong v. Duffey, supra; Crossen v. Duffey, supra; 29 O.Jur. 2d Injunctions ¶¶70, 100.

127a. The Court has given long and careful consideration to the damages which are to be awarded in this case. Damages may not simply be awarded separately with respect to each offense for which defendants have been found liable, and then tallied to arrive at a final figure. Rather, damages must be reflective of the injuries plaintiff has suffered as a result of defendants overall effort to suppress plaintiff as a dissident, which effort includes the offenses tried in this lawsuit.

b. Mindful of this concern, the

Court has extensively contemplated the compensatory damages to which plaintiff is entitled. Such damages must include the economic loss incurred by plaintiff as a result of defendants' manipulation of the referral system, and defendants' failure to register plaintiff for referral to employment following his trial. Additionally, the Court has considered the pain and suffering plaintiff has undergone as a result of the attacks upon his person and the humiliation, emotional distress, and mental anguish experienced by plaintiff over a period which to date spans in excess of eight years. Considering these factors, the Court awards plaintiff compensatory damages, severally, as follows:

1. Lost wages for the period of April 1, 1970 to September 1, 1973, to be computed by sub-

tracting plaintiff's total income for this period, as reflected by plaintiff's federal income tax returns, from the average total income earned in this period by those engineers registered in the same referral deck as plaintiff.395/ Pro-rations shall be made where nenessary to accurately reflect this damage figure.

2. The union shall pay to the appropriate pension retirement fund those sums, if any, which are necessary in view of the above wage award to make the plaintiff whole in regard to his pension-retirement benefits.

3. TEN THOUSAND DOLLARS ($10,000) for pain and suffering, humiliation, emotional distress, mental anguish and loss of the right to participate in union activities for the period of two years. 396/

c. The Court must now turn its attention to the determination of what punitive damages should be awarded against defendants. The Court is mindful of the fact that punitive damages must serve to deter, not to destroy, and

must be imposed in a rational manner, bearing in mind the particularities of each defendant. With such thoughts in mind, the Court has pondered the actions of defendants in this case. Frank's own words best describe his conduct toward plaintiff, he was indeed a "hatchet man". However, Frank was only an instrument of Possehl, the movant force behind the conspiracy against plaintiff. These defendants have intentionally, willfully, and maliciously moved on all fronts to suppress plaintiff as a member of the dissident faction of Local 18. Further, during this period the membership of Local 18 maintained these defendants in their positions of power, perpetrating what had in effect become a dynasty in Local 18. The actions of Possehl and Frank demonstrate a callous indifference

to any interests other than their own, and are repugnant to the democratic spirit which gave rise to the American labor movement. This democratic spirit must be restored to Local 18, and these defendants as well as other ambitious, but unscrupulous individuals must be deterred from infringing upon it in the future. The Court awards punitive damages as follows:

1. THIRTY THOUSAND DOLLARS ($30,000) against Possehl.

2. TWENTY THOUSAND DOLLARS ($20,000) against Frank.

3. ONE HUNDRED FIFTY THOUSAND DOLLARS ($150,000) against Local 18.

The purpose of a punitive damage award is to deter unlawful future conduct on the part of others as well as the perpetrator. The Court takes judicial notice of the fact that Possehl is

now deceased. Therefore, the enforcement of the above award against him serves no purpose. It is accordingly vacated.

The Court's concern with respect to Frank and Local 18 is that the deterrent effects of a punitive damage award will be of limited duration. The most effective means of achieving deterenct in this case is the elimination of those practices and procedures which gave rise to this lawsuit. Therefore, the Court will defer execution of judgment and shall consider vacating the award of punitive damages as to these defendants provided that:

> 1. Frank agrees, through the submission of an appropriate written document, to refrain from seeking, campaigning, and holding any local or international office in the International Union of Operating Engineers for a period

of five (5) years.

2. Local 18 submits to the Court with thirty (30) days from entry of this order a plan, to be considered for adoption as an order of the Court, which will ensure that the channels of communication among and to the membership of Local 18 remain open and accessible to all serious candidates for union office without regard to platform, political affiliation, or financial ability.

Although no findings are made of specific violations regarding the electoral process, the totality of the conduct of Local 18, including manipulation of the referral process, has resulted in suppressing dissident members from achieving any position of influence within the union. Although Local 18 has complied with the legal minimums required of it regarding membership access to union meetings, mailing lists, and publications, that in view of the geographic and operational structure of

Local 18, enhanced avenues of communication within the union must be afforded in order to permanently remedy the difficulties presented by this lawsuit. The free and open exchange of knowledge, principles and ideals facilitates the development of the democratic process upon which the American labor movement is founded. The Court expects this plan to address these concerns in a meaningful fashion.

128. The Court awards damages in the amount of THREE THOUSAND FIVE HUNDRED DOLLARS ($3,500), payable to the treasury of Local 18, against defendant Possehl.

129. Defendants have engaged in a clear and consistent pattern of conduct to suppress plaintiff by reason of his dissident activities. In some in-

stances such conduct can only be remedied by the invocation of the Court's equitable powers. Therefore, by way of injunctive relief, the Court rules as follows:

> 1. Defendants shall expunge any and all record of plaintiff's charges, trial, conviction, suspension, and fine from the files of Local 18.[397]
>
> 2. Defendants are permanently enjoined from interfering in any way with plaintiff's exercise of the right afforded to him under the Bill of Rights, 29 U.S.C. §411.
>
> 3. Defendants are permanently enjoined from disciminating against plaintiff in the operation of the referral system.
>
> 4. In order to ensure against future misuse of the referral system, it is ordered that in every district of Local 18:
>
> > a. The employment referral cards of all members registering in the referral system shall be stamped as to reflect the time and date of registration.

b. All work orders received by the respective district offices shall be stamped in the same fashion as the employment referral cards.

c. Each district office shall compile a list of the work orders received each day and shall post said list for at least seven (7) consecutive days in a conspicuous manner in the district office, not less frequently than every one hundred twenty days. Original work orders used in compiling said lists shall be preserved for at least one year.

d. Immediately prior to, and immediately following each district meeting the referral deck shall be available to members for inspection and copying for a reasonable period of time. Members shall be entitled to inspect and copy the cards of those engineers before and after their own referral card, but shall not be entitled to handle the deck themselves.398/

130. The Court defers ruling on plaintiff's motion for attorney fees at this time.399/ Counsel shall brief this issue in light of the Court's pre-

sent ruling, plaintiff's brief to be submitted within ten days of this order, and defendants' brief to be submitted within ten days thereafter. Counsel shall brief with particularity what effect, if any, is to be given to the fact that plaintiff has been represented under the auspices of the Legal Aid Society of Cleveland, a non-profit organization.400/

IT IS SO ORDERED.

_____
Thomas D. Lambros
United States District Judge

DATED: _____

FOOTNOTES

1. Hereinafter LMRDA.

2. Hereinafter PRVTT.

3. Admitted for illustrative purposes only.

4. The Court admits the work records of Ken Delaney, Richard Pelton, Albert Dawses, Dan Kirkwood, Howard Salisbury and John Frank III.

5. The members, employees, and officers of Local 18 necessarily change with the passage of time. Accordingly, the Court shall refer to an individual's status in this regard only insofar as it is pertinent to these proceedings.

6. Hereinafter Local 18.

7. The constituent divisions are included in all singular references to Local 18.

8. Hereinafter International.

9. Hereinafter Possehl.

10. Hereinafter Rutherford

11. Hereinafter Frank.

12. Hereinafter Miller.

13. Hereinafter Blair.

14. As an exclusive hiring hall any individual, irrespective of membership in Local 18, must be allowed to register for employment, and must be referred to employment in the normal sequence of events.

15. One day referrals are not counted in calculating the twelve days. The ninety day period was reduced to sixty days in the 1972-1975 Ohio State Building Construction Agreement. Defendant-X-EE.

16. The two refusal rule does not appear in the 1972-1975 Ohio State Building Construction Agreement. Plaintiff contends, therefore, that this rule could not be enforced during this period. However, defense witnesses (eg. Possehl), members of the negotiation committee, testified that the only difference between the 1972-1975 Agreement and its predecessor is the wage structure; that the two refusal rule was not negotiated out of said agreement; that the absence of the rule was due to a printing error; and that the rule has been continously enforced.

Generally, the Court will not look beyond the face of a collective bargaining agreement in ascertaining its construction. However, in those instances where the agreement itself is alleged to be erroneous,, the Court may refer to the negotiation history of such agreements.

Upon review, it appears that the wage provisions of said agreement were not the only provisions altered. For example, Paragraph 29(I), Defendant-X-EE, reduces the registration time regarding request eligibility from ten days to three. Further, certain accomodations were made in the agreement in connection with the affirmative action plan adopted by Local 18. However, plaintiff has adduced no evidence rebutting defense testimony that the two-refusal rule was a valid provision in said agreement. Moreover, the necessity of this rule is obvious. In its absence engineers could simply wait until reaching the top of the deck, and then refuse referral until a premium job was offered. The Court finds the two-refusal rules to have remained in effect in the 1972-1975 Agreement.

17. The general membership meetings are usually referred to as "state" meetings. The Executive Board customarily meets the day before the state meeting.

18. See testimony of Ray Frankhouse; Defendant-X-SS.

19. Frankhouse and McMahon are presently Business Agents of District Two.

20. See testimony of plaintiff.

21. Plaintiff-X-62.

22. See testimony of plaintiff.

23. Id.

24. Plaintiff-X-65.

25. Plaintiff-X-65(a).

26. Plaintiff-X-61.

27. All members of Local 18 are entitled to be present at and participate in all state meetings of the Local, and all membership meetings of the various districts. A member's registration for work in a particular district in no way restricts his right to attend membership meetings of other districts. Defendant-X-J, Art. XXVIII, §1.

28. Any member in attendance at a meeting of Local 18, its districts, or its boards, upon being recognized by the presiding officer, is entitled to address the body without interruption save and excepting to call such member to order or for the purpose of giving explanation or information. Defendant-X-J, Art. XIX §10; Plaintiff-X-10(bb).

29. Compare testimony of plaintiff, Andrew Conway with testimony of Glen Brinker, Daniel Boyle. Further, plaintiff's testimony at trial appears inconsistent with his prior deposition testimony of April 1, 1974. See cross-examination of plaintiff.

30. E.g. Plaintiff-X-89 (b,c,d,g,k, p,q,r,s,t).

31. E.g. Plaintiff-X-89 (c.g.).

32. E.g. Plaintiff-X-89 (b,d,g,p,r, s,w,); Gary Kershner testified that Frank Roviscanne, District Representative, adjourned a meeting after recognizing Kershner, but before Kershner finished speaking. However, it is not clear that Kershner's comments were in order at the time of adjournment. Compare Scoville v. Watson, 368 F.2d 678 (7th Cir. 1964) with Harris v. Int. Longshoreman's Assn., Local 1291, 321 F.2d 801 (3d Cir. 1963).

33. See testimony of plaintiff. It is further noteworthy that plaintiff has failed to timely appear at Executive Board meetings to present grievances which the board has set for hearing. Plaintiff-X-10(t). Rebels have at times failed altogether to appear for such hearings. Eg. Plaintiff-X-11 (f.1).

34. E.g. Plaintiff-X-89(h). See Broomer v. Schultz, 239 F.Supp. 699 (E.D. Pa. 1965) aff'd 356 F.2d 984 (3d Cir. 1966).

35. See generally Plaintiff-X-11, 89. Plaintiff has not contended that he has been precluded from speaking at the state meetings, nor would such a contention appear warranted. See Plaintiff-X-11.

36. Members of the Hall group vituperated dissidents because it was "expected of them". See testimony of Ken Delaney.

37. See testimony of Glen Oberle.

38. Id.

39. Hereinafter Oberle.

40. Id; See testimony of Andrew Conway.

41. See testimony of Oberle.

42. See testimony of Ervin Shimman.

43. Id; See testimony of Oberle. James Grothaus shall hereinafter be referred to Grothaus. The rebels of District Two constantly took notes at all membership and board meetings of District Two and Local 18 due to their belief that the minutes of the meetings were not accurate. This practice of the rebels was particularly irritating to the hall group in District Two, as demonstrated by their frequent attempts to prevent the taking of notes. However, a review and comparison of Plaintiff-X-11 and Plaintiff-X-89 indicates that the rebels concern was justified. Plaintiff-X-11 consists of broad general minutes as opposed to Plaintiff-X-89 which identifies speakers and discussions. An example is found in Plaintiff-X-11(s) which describes the beating of Jack Shimman as a mere "disturbance".

44. See testimony of Rich Shipman.

Ray Frankhouse is presently a Business Agent of District Two.

45. See testimony of Oberle. Ken Delaney shall hereinafter be referred to as Delaney.

46. See testimony of Ervin Shimman.

47. Id; Plaintiff-X-11(1).

48. District Representatives and Business Agents.

49. See testimony of Ervin Shimman.

50. Id; See testimony of Ray Rojek, Delaney.

51. See testimony of Ervin Shimman.

52. Compare e.g. testimony of Thomas Jesse Preston with testimony of Herbert Brown.

53. See testimony of plaintiff, Ervin Shimman; Plaintiff-X-11(b).

54. See e.g. testimony of Gary Kershner, James Simpson, William Shimman.

55. See testimony of Gary Kershner.

56. Id.

57. Id.

58. Id.

59. See testimony of plaintifff, De-

laney, Iacampo, Everett, and Casper were from District One; Grothaus, Delaney, Frank and Salisbury from District Two.

60. Id.

61. Id; Plaintiff-X-69.

62. See testimony of Delaney.

63. See testimony of Delaney.

64. Id; See also testimony oe Ervin Shimman, Ray Rojek.

65. Id; See also testimony of Ray Frankhouse.

66. See testimony of Delany.

67. Id; See also testimony of Ervin Shimman, Ray Rojek, Ray Frankhouse.

68. See testimony of Ervin Shimman, Ray Rojek, Delaney.

69. See testimony of Ervin Shimman. Phillip Dawes was subsequently appointed to the Advisory Board of District Two.

70. See testimony of Delaney.

71. Plaintiff-X-40(a), (b).

72. Plaintiff-X-41(a).

73. Plaintiff-X-43, 43(a).

74. See testimony of James Kidwell.

75. A.J. Roberts was at that time a member of the Executive Board from District Three.

76. See testimony of Thomas Jesse Preston, Gary Kirshner, plaintiff.

77. See testimony of Gary Kershner.

78. See testimony of Thomas Jesse Preston.

79. See testimony of plaintiff.

80. See testimony of Eugene Symms.

81. See testimony of Oberle.

82. Several members of District Two have been threatened for their participation in various proceedings. See testimony of Oberle, Ray Rojek, Delaney. Frank has stated that he considers grand jury investigations into Local 18 affairs the equivalent of a state of war. See testimony of Ervin Shimman.

83. Hereinafter NLRB.

84. Plaintiff-X-76.

85. Plaintiff-X-66, 66(a).

86. The Court takes judicial notice of Judge Young's rulings in the case of John C. Shimman v. Terry Oliver Grothaus, No. C 73-364.

87. Plaintiff-X-74.

88. Plaintiff-X-67, 67(a).

89. See testimony of Delaney.

90. Subsequently Belkin & Belkin Co., L.P.A.

91. See testimony of Possehl; Plaintiff-X-124.

92. See testimony of Delaney.

93. See testimony of Thomas Jesse Preston; Plaintiff-X-124.

94. In regard to Delaney see the following invoices of Plaintiff-X-124: December 1, 1970; April 1, 1971; May 5, 1971; July 2, 1971; November 2, 1971; December 1, 1971; January 3, 1972; May 1, 1972; September 5, 1972; July 3, 1972; January 3, 1973; February 6, 1973.

In regard to Shell see the following invoices of Plaintiff-X-124; July 3, 1972; September 5, 1972.

95. See testimony of Possehl.

96. By his own admission, Delaney has committed perjury in related legal proceedings. This admission has been of much concern to the Court in its deliberations of this case. Nonetheless, considering Delaney's demeanor and testimony during the traditional and PRVTT portions of this trial, the

Court concludes that his testimony in this case is credible, and is to be weighed in an appropriate fashion with the remainder of the evidence in this case.

97. See testimony of plaintiff; Ervin Shimman.

98. Plaintiff-X-71(a).

99. See cross-examination of plaintiff; Defendant-X-GG, HH.

100. See testimony of Edward Duncan; Glen Brinker; Frank Hurd; Gary Kershner.

101. However, certain candidates were precluded from running for office due to the continuous good standing rule in effect prior to 1971. See e.g. testimony of Ervin Shimman.

102. See e.g. testimony of Ervin Shimman.

103. Id.

104. Plaintiff-x-3.

105. See testimony of plaintiff.

106. There has been testimony that Ray Frankhouse and James McMahon, Business Agents of District Two, have furnished names and phone numbers of operating engineers to the Rank and File Committee for campaign purposes. Id. However, it has not been established that these names were obtained from the

membership list of the Local. The names could have been as easily obtained from the ledger kept by Ray Frankhouse when he was a dissident. Further, copies of the membership list were apparently obtainable. Bernard Kelly, a District One rebel, testified that he had a copy of the membership list. Plaintiff-X-12.

107. Hereinafter HBA.

108. See testimony of George Abrams.

109. See testimony of Oberle.

110. See appendix to defendant's motion to file supplemental findings; International Union of Operating Engineers, Local 18, 204 NLRB 68 (1973); International Union of Operating Engineers, Local 18, 220 NLRB 147 (1973); International Union of Operating Engineers, Local 18 v. NLRB, 496 F.2d 1308 (6th Cir. 1974); NLRB v. International Union of Operating Engineers, Local 18, No. 73-1760 (6th Cir. May 10, 1977).

111. See e.g. Nix v. Fulton Lodge No. No. 2, IAM, 452 F.2d 794 (5th Cir. 1971) cert. denied, 406 U.S. 946 (1972); International Wire v. Local 38, International Brotherhood of Electrical Workers, 357 F.Supp. 1018 (N.D. Ohio 1972) aff'd 475 F.2d 1078 (6th Cir. 1973) cert. denied U.S. 867 (1973).

Plaintiff's reply brief to defendants' motion to file supplemental findings of fact and conclusions of law tacitly

acknowledges the applicability of the doctrine of collateral estoppel and in this case. As the underlying cause of action in this case concerns the LMRDA as opposed to the NLRA, the doctrine of res judicata cannot be invoked. The Court notes, however, upon reviewing all testimony concerning this matter, that is in accord with the NLRB findings concerning plaintiff's behavior.

112. See testimony of plaintiff.

113. Hereinafter Buttefield.

114. See testimony of Butterfield.

115. Id; See testimony of Michael Quinn.

116. Id.

117. Id; See testimony of plaintiff.

118. See testimony of Roger Stearns; Plaintiff-X-82(a), (b). The Court mindful of the testimony of plaintiff, Butterfield, Sergeant Quinn and others concerning the assault and battery charges filed against plaintiff. However, the findings of the NLRB precludes the Court's inquiry into the matter insofar as Robert Bowes is concerned. Further, the Court finds that there is insufficient evidence to determine whether plaintiff actually assaulted Leo Jankiewicz.

119. See testimony of plaintiff.

120. See testimony of Eugene Symms.

121. Id.

122. Plaintiff-X-12.

123. See testimony of Gary Kershner; Plaintiff-X-12.

124. See testimony of George Abrams; Plaintiff-x-12, the cross-examination of Bernard Kelly.

125. See Plaintiff-X-45(a), (b); Defendant-X-B, J. The charges were brought pursuant to the unanimous vote of the Election Committee, Plaintiff-X-89Y. This unanimity was subsequently disrupted, however, when Anthony Caternacci, a rebel, changed his vote. Plaintiff-X-48.

126. These articles are set forth in pertinent part below. It should be noted, that these articles do not specifically deal with the offense of interfering with a union election. Such an offense was added to the By-laws by way of amendment in 1973. Defendant-X-B, Article IX, §4(b). Nor does Defendant-X-B reflect the existence of an Article IX, §5 of the By-laws. It would appear Blair intended to charge plaintiff with violating Article X, §5; and that the 1973 amendment would properly be entitled §5(b).

Article III. Section 3.

The election of delegates shall

be conducted by secret ballot. Adequate safeguards to insure a fair election shall be provided by the Local Union in accordance with the International Constitution, applicable law, and such rules and regulations as may be promulgated by the General Executive Board. The ballots and all other records pertaining to the election of delegates shall be preserved for one (1) year by the appropriate official or officials designated by the Local Union.

* * *

Article XVI. Section 4.

Any member who shall be guilty of belonging to the Communist Party or who shall subscribe to the principles of communism or similar doctrines, or who shall engage in, advocate, approve or support the use of subversive tactics, force or violence, radicalism or disruption, revoluntionary or similar means designed or used to overthrow, destroy, nullify or otherwise render ineffectual the established order of the Government or this organization shall forthwith be expelled from membership or otherwise disciplined as the circumstances may require, which action may be taken and penalty imposed by either the Local Union of which the guilty party is a member or by the General President.

* * *

Article XXIII. Subdivision 3. Section (a).

Members of Local Unions shall con-

form to and abide by the Constitution, Laws, Rules, Obligation and Ritual, and the decisions, rulings, orders and directions of any authority of the International Union empowered by this Constitution to make them.

* * *

Article XXIII. Subdivision 7. Section (e).

Any officer or member of a Local Union...who commits an offense descreditable to the International Union or its subdivisions; who creates dissension among the members; who destroys the interest and harmony of the Local Union; ...who violates his obligation or any section of the Constitution, Rules, Edicts and Ritual of the International Union;...who is guilty of insubordination; or who refuses to acknowledge or perform the lawful command of those authorized within the International Union to issue the same, may be disciplined or, upon trial therefor and conviction thereof, be fined, suspended or expelled from his Local Union.

* * *

Article V. Section 2.

The election of delegates and alternates shall be conducted by secret ballot mail referendum in the month of February. The delegates and alternates shall be elected at large within the Districts. Each District shall elect

the same number of delegates and alternates and the number of delegates and alternates shall be equal. The delegate candidates and alternate candidates who receive the largest number of votes in their District shall be the elected delegates and alternates. Alternates, if needed, shall be the alternate candidates receiving the highest number of votes in their District.

* * *

Article IX. Section 5.

No member or applicant shall engage in conduct discreditable to the organization nor be guilty of any of the following acts: ...[T]he interference with or disruption of any election or election process concerning Local 18 or the International Union.

127. Plaintiff-X-49(a).

128. Plaintiff-X-47.

129. Plaintiff-X-4(b).

130. Plaintiff-X-49; Defendant-X-H.

131. Defendant-X-H.

132. Id.

133. Id; Plaintiff-X-4(d).

134. Plaintiff-X-4(d); 10(t). Plaintiff has asserted that neither the

charges nor his trial date were ever announced in the districts of Local 18. In this regard plaintiff relies heavily on the absence of such an announcement in the respective minutes of the district meetings. See Plaintiff-X-10(r-v); 11(h-n); 89(w-z); 90(a-h); 91(a-h); 92(a-h); 93(a-h). However, the fact that plaintiff would face trial was announced in the Buckeye Engineer, Plaintiff-X-2(u), and defense witnesses have testified that they were aware not only of the February 12, 1972 incident but also of plaintiff's trial date. See testimony of James Irwin, Walter Linder, Possehl. Further, there has been testimony that announcements are not necessarily reflected in the minutes. See testimony of Possehl, Walter Linder. Also, there is the possibility that the decision of the Executive Board to refer plaintiff's trial to District One was read at the district meetings. See Plaintiff-X-(a-d). Considering this evidence, plaintiff has failed to establish that defendants concealed his trial date or the charged offense from the local membership.

135. Plaintiff-X-50.

136. E.g. Plaintiff-X-1; Defendant-X-L.

137. Plaintiff-X-50(a), (b).

138. See testimony of plaintiff; Possehl.

139. See e.g. testimony of Ervin Shim-

man; Plaintiff-X-11(n).

140. Plaintiff-X-1.

141. Id.

142. Id; See e.g. testimony of Ervin Shimman; William Christian, Walter Linder.

143. See testimony of Delaney.

144. The Court notes that a similar disciplinary trial in district four did not draw an inordinately large attendance. See Plaintiff-X-91(f).

145. Defendant-X-B at 15. Article XII §§1,2 provide in pertinent part:

> [T]he President is authorized to delegate to a deputy appointed by him such duties as are required of the President in conducting a trial,....

146. Plaintiff-X-5.

147. Defendant-X-B at 25.

148. Defendant-X-13. The Court notes, however, the characteristically disparaging comments of Frank.

149. Defendant-X-B at 130.

150. See testimony of plaintiff; Plaintiff-X-1. The By-Laws of Local 18 were subsequently amended to prohibit such actions by the presiding officer.

151. Defendant-X-B at 131; Plaintiff-X-51. Plaintiff paid his fine on June 9, 1972. Plaintiff-X-54.

Plaintiff's suspension precluded his candidacy in the 1972 state officer election. However, the Court cannot fanthom how the defendants could ever be suspected of contriving plaintiff's theft of the election list, plaintiff's trial, and plaintiff's suspension in order to bar plaintiff from the 1972 election. That is not to say that defendants would not seize upon an opportunity to preclude plaintiff from running in the 1972 election.

152. See testimony of Possehl.

153. See testimony of plaintiff; Shirley Hacker.

154. See testimony of Possehl; Plaintiff-X-54(a); 124 (Invoice of June 1, 1972).

155. See testimony of Shirley Hacker.

156. Id; See testimony of plaintiff. Plaintiff's suspension applied only to union membership and in no way affected his right to register for employment in the referral system.

157. See e.g. testimony of Possehl.

158. See testimony of plaintiff; Plaintiff-X-54(a).

159. See testimony of Shirley Hacker. Hacker testified that Rutherford ordered plaintiff's card returned to the deck. The inference drawn, however, in view of the circumstances surrounding the removal of plaintiff's card is that Rutherford acted pursuant to Possehl's order.

160. NLRB v. International Union of Operating Engineers Local 18, note 101, supra.

161. Plaintiff-X-55.

162. Article XXIII, Subdivision 7, §h, provides in pertinent part:

> Article XXIII. Subdivision 7. Section (h).
>
> A member who has been suspended under the provisions of this subdivision may be restored to membership in good standing and to his membership number only by making application on the form furnished by the General Secretary-Treasurer, together with the payment of all dues, assessments and fines then in arrears, the reinstatement assessment and in addition an amount equal to three months' dues.

163. Plaintiff-X-10(bb). Article XXV, §1(d), International Constitution, provides that the Executive Board shall "act for the Local Union in business and administrative matters...including reinstatement of members...."

164. See testimony of plaintiff.

165. Plaintiff-X-55(a)(b).

166. Plaintiff-X-56.

167. Plaintiff-X-57.

168. Plaintiff-X-58, 58(a).

169. Plaintiff-X-58(a). Plaintiff-X-59 is an application for reinstatement to Local 18. However, this application is not dated, nor is there any indication from either the document or testimony as to the circumstances under which plaintiff acquired this application.

170. See Defendant-X-J, Article XII, §6.

171. Plaintiff's expulsion did not mark the first incident of unilateral Executive Board action. In a similar fashion, William Shimman was censored by the Executive Board for failure to process grievances. Plaintiff-X-10(1). The Court notes this action by the Executive Board only for the fact that it was taken, and offers no comment as to its merits.

172. Defendant-X-J, Article X, §1; Plaintiff-X-24.

173. See testimony of plaintiff. Plaintiff was the only member of District One to utilize an answering service. See testimony of Steve Mayor.

174. Defendant-X-P-W.

175. Defendant-X-P-Q.

176. Id.

177. See cross-examination of plaintiff.

178. Defendant-X-P,Q.

179. See Plaintiff-X-69.

180. See testimony of Possehl.

181. Id; see testimony of Shirley Hacker.

182. Id; see testimony of Steve Mayor, Walt Linder, Paul Knott; Plaintiff-X-10 (z). It does not appear that minutes are regularly taken of such staff meetings, defendants having failed to produce any and all of such minutes as requested by plaintiff. However, such minutes do appear to have been taken on occasion. Plaintiff-X-10(2).

183. See testimony of Steve Mayor.

184. See testimony of Paul Knott.

185. See testimony of William Christian.

186. See e.g. testimony of Ervin Shimmar, Possehl. Possehl testified that he promptly abolished this rule as soon as he became aware of it.

187. See testimony of Steve Mayor.

188. Plaintiff-X-11(t).

189. See testimony of William Christian.

190. See testimony of Possehl.

191. Id; Upon graduation, apprentices are certified as qualified to operate certain equipment. Plaintiff-X-60,60(a).

192. See e.g. testimony of Shirley Hacker, Ervin Shimman.

193. Plaintiff-X-125(b).

194. See testimony of plaintiff, Thomas Jesse Preston, rebuttal testimony of Ervin Shimman; Plaintiff-X-115(a-c).

195. McMahon previously testified that he would assist members in inspecting their place in the deck.

196. Gary Kershner was the only District One rebel other than plaintiff to testify as to his experience in inquiring about his place in the referral deck. Kershner, like plaintiff, received an approximation as to his place in the deck. However, Kershner further testified that he never sought to actually inspect the deck. See also testimony of Glen Brinker.

197. See note 101, supra. The Court notes, however, upon reviewing all testimony concerning this matter, that it is in accord with the NLRB findings concerning plaintiff's behavior.

198. Plaintiff testified that he never

attempted to inspect the deck prior to the time he became a rebel. Plaintiff's antics at the hall, and his attempts to see the deck postdate such period.

199. See testimony of Steve Mayor.

200. See testimony of Gary Kershner.

201. Plaintiff-X-95.

202. See testimony of plaintiff; Plaintiff-X-69.

203. Id.

204. The Court has carefully studied the testimony and work records of Ervin Shimman, Plaintiff-X-29, Thomas Jesse Preston, Plaintiff-X-42, Gary Kershner, Plaintiff-X-87, James Simpson, Plaintiff-X-94, and Robert Eirman, Plaintiff-X-97, and concludes that in the main these records substantiate the Court's finding that the referral system has been manipulated. However, a detailed analysis of these records would require a great deal of discussion as to the impact of the variable factors previously commented upon, e.g. a comparison of average annual employment between an apprentice and a master mechanic. The Court sees no need to undertake such an elaborate analysis in view of the pronounced contracts in plaintiff's work record.

205. Kershner's work record does not reflect the dispatcher's call of Decem-

ber 8, 1972. However, that fact in and of itself does not appear suspect. For example, the unanswered calls to plaintiff's answering service do not appear on his work record, but plaintiff admits having been aware of such calls. Compare Plaintiff-X-69 with Defendant-X-(P-Q) and testimony of plaintiff.

206. Plaintiff-X-87.

207. See testimony of Gary Kershner.

208. Id; Plaintiff-X-87.

209. Kershner also testified that on one occassion while working for a contractor he openly opposed Possehl at a district meeting, and that shortly thereafter he and his machine were transferred to a job which immediately ended, resulting in Kershner's lay-off. However the decision to transfer a machine and its operator lies with the contractor, not Local 18. Such a transfer does not evidence a violation of the referral system, absent a conspiratorial agreement between the contractor and Local 18. The evidence adduced does not establish such an agreement in this instance.

210. See testimony of Frank Hurd. Plaintiff has attempted to demonstrate that Hurd's employment requests were tampered with, but plaintiff has failed to carry his burden of proof in this regard.

211. See testimony of Glenn Brinker.

The Court notes the following collective bargaining agreement provisions. Paragraph 21 of Defendant-X-EE provides.

> Not more than one complete shift from one piece of equipment to another and return may be made in any one day and this only on equipment within the hourly or day-pay classifications and provided this change does not interfere with another employee's work day. The employee will be paid at the rate of wages for the classification which provides the highest wage rate for that day.

Paragraph 46 of Defendant-X-EE provides in pertinent part:

> In all counties covered by this Agreement, the following Classifications shall be employed on a WEEKLY PAY Basis:
>
> Cherry Pickers
> Cranes (All Types)

See also testimony of Gary Kershner that engineers may not transfer from one piece of equipment to another.

212. Dan Boyle testified as to working for The Ross Crane Rental Company and being transferred to various contractors' payrolls while operating Ross Crane equipment for such contractors. However, plaintiff has not demonstrated this practice violated the referral or was simply a project transfer within the meaning of ¶29(I) of Defendant-X-EE.

213. Plaintiff-X-12.

214. See testimony of James Simpson regarding Business Agent Mike Kasper and District Representative Frank Roviscane.

215. Compare testimony of James Simpson with Steve Mayor and James L. Wilson.

216. See testimony of Ervin Shimman' Plaintiff-X-29. The Court adopts but will not reiterate those statements set forth in Findings of Fact, ¶40.

217. See testimony of Ervin Shimman.

218. Id.

219. Id; Plaintiff-X-29.

220. Id.

221. Id; Plaintiff-X-30.

222. See testimony of Ervin Shimman.

223. Id.

224. See testimony of Ervin Shimman; Plaintiff-X-29.

225. Id.

226. Id.

227. See testimony of Oberle.

228. Id.

229. Id; When Oberle's wife learned

of Frank's comments she attempted to call Possehl in Cleveland, Ohio. Plaintiff-X-83. However, Possehl was not in the office to take the call. Nor does it appear that Mrs. Oberle left any message.

230. Id.

231. Id.

232. Plaintiff-X-84.

233. See testimony of Oberle; Ray Rojek.

234. See testimony of Oberle.

235. Id.

236. Id.

237. Id; Oberle was subsequently accused of "hiring off the bank" at the next District Two meeting. Id.

238. See testimony of Walter Shimman.

239. Id.

240. Even by the most subjective of standards it would appear that Shiman's refusal of the Lima job for health reasons should not have been counted for purposes of the two-refusal rule.

241. See testimony of Walter Shimman. It is not clear as to whether the 50 mile rule was applied automatically, or had to be specifically invoked by a refusing engineer. It is difficult to

imagine, however, an engineer who would desire to waive the right to be exempted from the two-refusal rule. Be that as it may, the vagueness concerning the operation of the rule is merely another example of the subjective nature of the referral system.

242. See testimony of Walter Shimman

243. Id; All testimony of Possehl.

244. But see contra testimony of Possehl.

245. See testimony of Walter Shimman.

246. See testimony of Andy Conway.

247. See testimony of Ray Rojek.

248. Id; see testimony of James McMahon.

249. See testimony of Ray Rojek.

250. Jack Frantz is presently a member of Local 18's Executive Board. See testimony of Rich Shipman; Plaintiff-X-110.

251. See testimony of Rick Shipman.

252. See testimony of Delaney.

253. Id.

254. Id.

255. Id.

256. Id.

257. Id; Plaintiff-X-140, work records of Delaney and Albert Dawes.

258. Id; Plaintiff-X-140, work record of Dan Kirkwood. The Court notes the respective termination dates of Dawes and Kirkwood.

259. See testimony of Delaney; Plaintiff-X-140, work records of Delaney and Richard Pelton. Delany has testified that on June 4, 1976 Howard Salisbury went from the Plumb Construction job in Fostoria, Ohio to the Mid-American Pipeline job in Cygnet, Ohio without going through the referral. However, there was no testimony as to the number of engineers in the referral at this time, and therefore the Court cannot determine whether Salisbury actually violated the referral system. See testimony of Delaney; Plaintiff-X-140, work records of Delaney and Howard Salisbury.

260. See testimony of Delaney; Plaintiff-X-140, work records of Delaney and John Frank III.

261. See testimony of Delaney.

262. See testimony of Thomas Jesse Preston.

263. See testimony of Robert Eirman; Defendant-X-DD. Eirman also testified as to violations of the "seven day rule" which governs the reinstatement of equipment previously terminated. See

Defendant-X-EE, ¶51. However, it has not been demonstrated that the District Three Administration was aware but, of intentionally disregarded such a violation.

264. See cross-examination of Dr. John F. Burke.

265. The Court's finding of course is not intended to reflect in any way upon the qualifications of Dr. Burke.

266. See testimony of Possehl. Counsel have stipulated as to the informational function of the Buckeye Engineer.

267. Id.

268. Id; See Plaintiff-X-2(a-ee_.

269. Id.

270. See Plaintiff-X-2(a-ee).

271. See ¶¶1, 2. Plaintiff's Supplemental Proposed Findings of Fact and Conclusions of Law.

272. Plaintiff-X-2(f).

273. Plaintiff-X-2(i).

274. Plaintiff-X-2(r).

275. Plaintiff-X-2(u).

276. Plaintiff-X-2(v).

277. Plaintiff-X-2(w).

278. Plaintiff-X-2(x). The following paragraph appeared in the January, 1972 "Progress Report." Plaintiff-X-2(t).

> Don't forget you'll soon be getting ballots to vote your choices for delegates to our International Convention to be held in April. Vote for the experienced man who can do a job for all of Local 18.

However, such a comment preceding the choice of an international delegate can hardly be considered prejudicial to the dissidents. The five officers of Local 18 are automatic delegates to the convention. Therefore, the reference to the "experienced man" applies equally well to dissidents and hall group members.

279. Plaintiff-X-2(b).

280. Plaintiff-X-2(c).

281. Plaintiff-X-2(p).

282. Plaintiff-X-70.

283. Plaintiff-X-80(a).

284. Plaintiff-X-80(b).

285. Findings of Fact ¶40.

286. Id, ¶¶43-46.

287. Id, ¶¶47-52.

288. Id, ¶64.

289. Id, ¶67.

290. Id, ¶¶69-90.

291. Id, ¶¶40, 59(g), 81(d)(3), (1)(1)(2), 82 (b) (2) (6) (8), 83 (b), 84, 89, 94.

292. E.G. Plaintiff The Parties, ¶12 (a)(1).

293. See e.g. testimony of Possehl, William Christian, Paul Knott, Walter Linder.

294. See testimony of Possehl.

295. See Findings of Fact, ¶67(b); testimony of Possehl; Plaintiff-X-10(h).

296. See e.g. the executive Board discussions set forth in Plaintiff-X-10(1), and the Report of William Corris, District six attached thereto.

297. See e.g. testimony of Glen Oberle, William Shimman; Ervin Shimman.

298. See tesimony of Possehl.

299. Findings of Fact, ¶81(e)(1).

300. Id, ¶83(d)

301. See cross-examination of Possehl.

302. See testimony of Evin Shimman.

303. Findings of Fact, ¶5B.

304. The Court notes, however, that any animus on the part of Rutherford cannot be construed as being totally one-sided and without foundation. As has been discussed in the Court's Findings of Fact, Plaintiff was at times a very obstreperous individual. Further, plaintiff's antics were sometimes directed at Rutherford. On one occasion, following a District One meeting, plaintiff approached Rutherford and stuck a prophylactic condom in Rutherford's shirt pocket stating, "The next time you screw Local 18, wear this."

305. O.R.C. §2305.11 provides for a one year limitations period with respect to malicious prosecution. Hruska v. Severance Specialty, Inc., 498 F.2d 796 (6th Cir. 1974); Skarbinski v. Henry H. Krause Co., 378 F.2d 655 (6th Cir. 1967); Avco Delta Corp. of Ohio v. Walker, 22 Ohio App. 2d 61, 258 N.E. 2d 254 (10th Dist., 1969); Bd. of Education of Miami Trace Local School Dist. v. Marting, 7 Ohio Misc. 64, 217 N.E. 2d 712 (Com.Pl., Madison County, 1966).

306. See e.g. Plaintiff-X-10.

307. It cannot be disputed that Rutherford's actions constituted at least a technical violation of Local 18's Bylaws. However, a violation of union bylaws does not automatically constitute a violation of 29 U.S.C. §411(a)(1), See e.g. Null v. Carpenters District Council of Houston, 239 F.Supp. 809 (S.D. Tex. 1965); Gurton v. Manuti, 235 F.Supp. 50 (S.D.N.Y. 1964), but must be

evaluated in view of the surrounding circumstances.

308. Plaintiff has no standing to enforce the rights of others under 29 U.S.C. §411. E.g. Keene v. Ice Machinery Independent Employees Assn., 331 F. Supp. 1355 (M.D.Pa. 1971); Broomer v. Schultz, supra.

309. As Rutherford was deceased at the time of trial, no inference may be drawn from his failure to testify.

310. Gary Kershner testified in his opinion Blair had conducted the 1972 International Delegate election to the best of his ability.

311. Grand Lodge of Int. Assn. of Machinists v. King, 335 F.2d 340, 345 (9th Cir. 1964) cert. denied 379 U.S. 920 (1964).

312. Miller v. Holden, 535 F.2d 912, 915 (5th Cir. 1976).

313. See e.g. Cooke v. Orange Belt Dist. Council of Painters, 529 F.2d 815 (9th Cir. 1976); Gabauer v. Woodcock, 520 F. 2d 1084 (8th Cir. 1974), cert. denied 423 U.S. 1061 (1976); Wood v. Dennis, 480 F.2d 849 (7th Cir. 1973); Schonfeld v. Penza, 477 F.2d 899 (2d Cir. 1972). But see Harrison v. Local 54, Amer. Fed. of St. E&M Emp., 518 F.2d 1276 (3d Cir. 1975); Sheridan v. United Brotherhood of Carpenters, 306 F.2d 152 (3d Cir. 1962).

314. The Ninth Circuit further held that such action by the union was actionable directly under the provisions of 29 U.S.C. §412.

315. Grand Lodge of Int. Assn. of Machinists v. King, supra at 342.

316. Id. at 342; Nt. 8 at 342.

317. Cited with approval by the Ninth Circuit in Phillips v. Int. Assn. of Bridge, S&O Iron Wkrs., 556 F.2d 939, 941 (9th Cir. 1977).

318. The following notice, posted on the union hall bulletin board, was called to the member's attention:

It is the established policy of the National Maritime Union that only official union publications may be distributed inside the Hiring Halls or other union offices. No solicitation is permitted inside any union buildings. Any persons attempting to solicit sales or distribute unauthorized literature inside NMU buildings will be asked to discontinue such practice and, in the event they fail to comply with such request, will be required to leave the premises.

319. Morrissey v. National Maritime U. of America, 544 F.2d 19, 26-27 (2d Cir. 1976).

320. Morrissey v. National Maritime U. of America, 397 F.Supp. 659, at 669 (S.D.N.Y. 1975).

321. Bradford v. Textile Wkrs. of America, 563 F.2d 1138, 1142 (4th Cir. 1977). See also Duncan v. Peninsula Shipbuilders Assn., 394 F.2d F.2d 237 (4th Cir. 1968).

322. The court considers the concept of "discipline" as set forth in Miller to be consistent with the decisions of the remaining circuits which have addressed this area, and therefore will not discuss these decisions in detail. E.G. Williams v. Int. Typographical U., 428 F.2d 1295 (10th Cir. 1970) cert. denied. 400 U.S. 824 (1970).

323. The Court does not imply that other exceptions may not exist.

324. See Findings of Fact ¶¶33, 35, 44, 46, 66, 74.

325. Plaintiff has failed to prove he has been discriminated against in his right to vote or nominate candidates as provided for by 29 U.S.C. §411(a)(1). E.g. Calhoon v. Harvey, 379 U.S. 34 (1964). Nor has plaintiff proven that he was denied his right to speak at union meetings. However, the violence inflicted upon plaintiff has certainly precluded his attendance at certain meetings. Further, said violence considered in conjunction with the economic discrimination suffered by plaintiff clearly serves as an intimidating factor in plaintiff's participation in union meetings.

326. But see contra Morissey v. Natio-

nal Maritime U. of America, supra. The case at bar is distinguishable from Morrisey in that Morrisey only prohibited the distribution of literature within the union hall, whereas Local 18 precluded such distribution on any union property. Although the efficient operation of the union hall may justify a regulation of the sort imposed in Morrisey, no such rationale justifies the type of restraint imposed by Local 18.

327. The surreptitious nature of defendants' actions in manipulating the referral system militates against any finding that plaintiff was entitled to the procedural protections of §411(a)(5). However, under certain circumstances union interference with the employment opportunities of its members may constitute "discipline" within the context of §411(a)(5) and §529. E.g., Miller v. Holden, supra; Cooke v. Orange Belt Dist. Council of Painters, supra; Figueroa v. National Maritime U. of America, 342 F.2d 400 (2d Cir. 1965); Detroy v. American Guild of Variety Artists, 286 F.2d 75 (2d Cir. 1961); Burris v. Int. Bro. of Teamsters, 224 F.Supp. 277 (W.D.N.C. 1963). But see Lucas v. Kenney, 220 F.Supp. 188 (N.D. Ill. 1963); Allen v. Armored Car Chauffeurs & Guards, 185 F.Supp. 492 (D.N.J. 1960).

328. Although defendants Possehl and Frank did not have the exclusive power to accept or reject plaintiff's petition for reinstatement, they were the

motivating force in effecting said rejection. Moreover, the rejection was accomplished through the action of the Executive Board, the management unit of Local 18. Findings of Fact ¶67.

329. In Carroll v. Associated Musicians of Greater New York, Local 802, 235 F. Supp. 161 (S.D.N.Y. 1963) the court held that the refusal of a union to reinstate an expelled member was not itself actionable unless the expulsion was unlawful. Carroll is distinguishable from the case at bar in that plaintiff was not expelled, only suspended; and, as will be discussed infra plaintiff's suspension was unlawful.

330. The Court futher notes that such action by the Executive Board does not comply with the By-laws of Local 18. Defendant-X-J, Art. XII, §6.

331. The Court finds that plaintiff was "served with written specific charges" and "given a reasonable time to prepare his defense" within the context of §411(a)(5)(A,B). Further, the sections of the International Constitution and By-laws under which plaintiff was charged are not on their face unconstitutionally vague or ambiguous as to warrant the Court striking down such sections. Nor has plaintiff demonstrated that defendants have impermissibly utilized said sections to discipline dissident members as to require the Court's intervention. E.g. Kuebler v. Cleveland Lithographers and Photo. U., Loc. 24-P, 473 F.2d 359 (6th Cir. 1973).

Further, as will be discussed, infra, the Court is precluded from inquiry into the merits of the charges, or Blair's motive in filing said charges.

332. The rationale for this holding is set forth in Cornelio v. Metropolitan District Council of Philadelphia, 243 F.Supp. 126, 129 (E.D. Pa. 1965) aff'd 358 F.2d 728 (3d Cir. 1966) cert. denied 386 U.S. 975 (1967).

The answer to the contention lies in the statement of the fundamental principle that the right to be represented by counsel,*** does not apply to hearings before labor unions.*** All that a member is entitled to *** is a fair hearing. This means only that before any action is taken against him he must be informed of the charges and be given an opportunity to hear them and refute them.

333. The Court notes that consideration of such motive by the tribunal in reaching its verdict may constitute an independent violation of §411, Burke v. International Bro. of Boilermakers, 302 F.Supp. 1345 (N.D. Cal. 1967) aff'd 417 F.2d 1063 (9th Cir. 1969), redressable under §§412, 529. In the instanct case, however, the charges against plaintiff can only be construed as being the sole and exclusive product of plaintiff's own irresponsible conduct.

334. It is no defense to an action based upon failure to observe the procedural requirements of 29 U.S.C. §411 (a)(5) for the union to allege or prove that it has disciplined the charged

member for a legitimate union purpose. Figueroa v. National Maritime U., supra.

335. The Court notes with interest that Falcone and Parks with approval; and that Tincher cites both Falcone and Parks with approval. See also Cornelio v. Metropolitan District Council of Philadelphia, supra, and Null v. Carpenters District Council of Houston, supra, in this area.

336. Falcone v. Dantinne, 420 F.2d 1157, 1168 (3d Cir. 1969).

337. Kuebler v. Cleveland Lithographers and Photo. U., Loc. 24-P, supra, at 364.

338. E.g. Delaney.

339. Findings of Fact ¶62.

340. See also e.g. Stein v. Mutual Clerk's Guild of Massachusetts, Inc., 384 F.Supp. 444 (D. Mass 1974) aff'd 560 F.2d 486 (1st Cir. 1977).

341. Such bias could violate §411(a)(5) either by its direct effect upon the evidence presented to the jury, or its cumulative prejudicial influence upon the jury.

342. Plaintiff has specifically challenged Rutherford's admission into evidence the letter of George Abrams, and the arguments of the prosecution based thereon. However, the letter was, in the main, cumulative to the testimony adduced at plaintiff's trial.

and plaintiff therefore incurred no prejudice by its admission. C.f. Burke v. Int. Brd. of Boilermakers, supra. Nor did the prosecution misrepresent the potential difficulties in certifying the election as a result of plaintiff's conduct.

343. Plaintiff has alluded to the fact that the denial of his "requests" for safeguards at trial violated §411(a)(5). The Court sees no merit to this petition.

344. Naturally, plaintiff's sentence cannot stand in view of the Court's ruling that plaintiff did not receive a full and fair hearing. The Court's comment as to the severity of the sentence is only in reference to any bias on the part of Rutherford.

345. The Court finds that plaintiff did not receive prejudicial pre-trial publicity in the Buckeye Engineer, as to violate §411(a)(5).

346. There is no doubt that such action constitutes discipline within the context of §411(a)(5) as being taken under color of union authority; in the interests of the union and membership; and, which discriminated against plaintiff in a fashion which set him apart from other engineers of comparable standing. E.g. Miller v. Holden, supra.

347. See e.g. Simmons v. Avisco, Local 713, 350 F.2d 1012 (4th Cir. 1965).

348. See testimony of Possehl.

349. In view of this ruling, the Court need not reach the issue of Local 18's authority to remove plaintiff's referral card from the out-of-work deck.

350. Although the United States Court of Appeals for the Sixth Circuit upheld defendants removal of plaintiff's referral card from the out-of-work deck, said ruling does not preclude the Court's finding that such removal violated §411 (a)(5) of the LMRDA. The provisions of the LMRDA and National Labor Relations Act, upon which the Sixth Circuit based its ruling, are cumulative in nature. Cooke v. Orange Belt Dist. Council of Painters, supra.

351. There is no indication that Article X,§1 was applied in any other manner than prospectively from the date of passage.

352. Further, plaintiff's unreasonable conduct adversely reflects upon plaintiff's sense of obligation to Local 18 as an institution. 29 U.S.C. §411(a)(2).

353. Findings of Fact ¶71(a).

354. Id, ¶71(i).

355. Additionally, the language of §481(c) is framed in reference to specific elections.

356. E.g. 29 U.S.C. §411(a)(1).

357. Plaintiff's First Amended Complaint ¶¶12(c-e), 16(a)(b), 36(d).

358. Plaintiff's Proposed Conclusions of Law ¶14.

359. In certain labor matters where judicial intervention is otherwise not permitted, the federal courts may issue prospective injunctive relief based upon a past pattern of violations. See e.g. Southern Ohio Coal Co. v. U.M.W., 551 F.2d 695 (6th Cir. 1977), U.S. App. Pndg.

360. The Court does consider defendant's harsh criticism of plaintiff and other dissidents in the Buckeye Engineer to be part of defendants' overall attempt to suppress the dissident movement. Such criticism was clearly intended to denegrate and ridicule plaintiff and other dissidents before their fellow engineers for pursuing such protected activities as opposing defendants in Local 18 politics and instituting litigation against Local 18. Although this criticism if isolated upon and considered in and of itself may not constitute a violation of §411(a)(2)(4), its true import becomes apparent when considered in context with the other acts of intimidation visited upon plaintiff and the dissident faction.

361. The remedy available for violations of §481(c) is basically restricted to injunctive relief. The Court may not intrude on the editorial judgment of the union by requiring the printing of certain selected candidates material. E.g. Sheldon v. O'Callaghan,

supra, 335 F.Supp.; Yablonski v. U.M.W., 305 F.Supp. 868 (D.D.C. 1968) supplemented 305 F.Supp. 876 (1968).

362. Compare Usery v. Int. Org. of Masters, Mates & Pilots, 538 F.2d 946 (2d Cir. 1976); Dunlop v. Stove Furnace and Allied Appliance Wkrs., 411 F.Supp 801 (E.D. Mo. 1976); Hodgson v. Liquor Salesmens' U., Local No. 2, 334 F.Supp. 1369 (S.D.N.Y. 1971); Yablonski v. U.M.W. supra; Sheldon v. O'Callaghan, 497 F.2d 1276 (2d Cir. 1974); New Watch-Dog Committee v. New York City Taxi Drivers U., 438 F.Supp. 1242 (S.D.N.Y. 1977); Morrissey v. Curran, supra; Sheldon v O'Callaghan, 335 F.Supp 325 (S.D.N.Y. 1971).

363. Compare, Yablonski v. U.M.W., supra, which, within five consecutive editions, referred to the incumbent president 166 times, and featured him pictorially 16 times, while simultaneously failing to provide his opponent with any coverage whatsoever.

364. Findings of Fact ¶¶48, 50-52.

365. See generally, U.S. v. Rubin, 559 F.2d 975 (5th Cir. 1977); Morrissey v. Segal, 526 F.2d 121 (2d Cir. 1975).

366. But see McNamara v. Johnston, 522 F.2d 1157 (7th Cir. 1975) cert. denied 425 U.S. 911 (1976).

367. The clear language of 29 U.S.C. §185 andpertinent judicial precedent

established that this section may not be used to bring suit against union officers. See e.g. Foam & Plastic Div. Tenneco Chemical, Inc. v. Int. Brd. of Teamsters, 520 F.2d 945 (3d Cir. 1975); Alloy Cast Steel Co. v. U.S.W., 70 F.R.D. 687 (N.D. Ohio 1976); Jersey Farms Milk Service Inc. v. Amalgamated Meat Cutters & Butcher Workmen of N.A., 297 F.Supp. 1098 (M.D. Tenn. 1969).

368. The provisions of 29 U.S.C. §185 may be invoked against a union by individual union members seeking to redress uniquely personal rights such as wages, hours worked, and overtime. E.g. Hines v. Anchor Motor Freight, 424 U.S. 554 (1967).

369. Any failure to exhaust internal union remedies on the part of plaintiff is obviously excuseable on grounds of futility.

370. The requisite element of intent has been expressly held not to mean specific intent, but invidiously discriminatory animus. Griffin v. Breckinridge, 403 U.S. 88, n. 10 at 102; Glasson v. City of Louisville, 518 F.2d 899 (6th Cir. 1975); Cameron v. Brock, 473 F.2d 608 (6th Cir. 1973).

371. The concept of "equal enjoyment of rights secured by the law to all" encompasses "equal protection of the laws" and "equal privileges and immunities under the laws". The Court notes, but need not reach the fact that the term "privileges and immunition" has re-

ceived a very limited construction, See Slaughter-House Cases 83 U.S. 36 (1837). Plaintiff has not alleged a conspiracy to deprive him of any privilege or immunity, and the Court therefore need only address what constitutes the deprivation of equal protection of the laws. See Murphy v. Mount Carmel High School, 543 F.2d 1189, N.2 at 1192 (7th Cir. 1976).

372. The Court's conclusion necessarily requires a remedial, as opposed to substantive, construction of §1985(3). The Court is cognizant that there is a split of authority regarding this construction, See e.g. McLellan v. Mississippi Power & Light Co., 545 F.2d 919, N.N. 23,32-34 (5th Cir. 1977); Lopez v. Arrowhead Ranches, 523 F.2d 924, n.3 at 927-928 (9th Cir. 1974); Arnold v. Tiffany, 487 F.2d 216, n.3 at 219 (9th Cir. 1973), but nonetheless is convinced that a remedial construction is proper. Nor does the Court consider such construction to render §1985(3) superfluous. To the extent that the Honorable Don Young felt constrained to hold otherwise in Shimman v. Grothaus, supra, the Court must respectfully disagree.

373. But see e.g. Lopez v. Arrowhead Ranches, supra; Bellamy v. Mason's Stores, Inc., 508 F.2d 504 (4th Cir. 1974); Heyn v. Board of Suprs. of La. State Univ., 417 F. Supp. 603 (E.D.La. 1976); Western Telecasters v. California Fed. of Labor, 415 F.Supp. 30 (S.D. Cal. 1976).

374. Plaintiff's "class", which has been in existence since 1959, clearly satisfies the requirements of Azar v. Conley, supra, and Cameron v. Brock, supra. Additionally, such class appears to satisfy even the more stringent standards of other courts.

375. The Court's use of "defendants' refers to Possehl and Frank, as Local 18 is not a "person" within the meaning of §1985(3).

376. See Findings of Fact ¶¶33, 35, 40, 42-46, 51, 52, 57, 64, 66, 67, 70-91, 94, 95. The Court's reference to Findings of Fact ¶42 is not to be considered in any way inconsistent with the Court's entry of judgment in favor of Rutherford.

377. Nor may defendants avoid this waiver by itemizing those acts comprising the violation of §411, e.g. assault and battery, and asserting the individual statutes of limitations applicable to such acts as a defense anew. The Court will look past the surface of the acts in order to ascertain the true nature of the violation they consumate. See e.g. Morrow v. Igleburger, 67 F.R.D. 675 (S.D. Ohio 1974); Wallick v. Int. U. of Elec., R&M Wkrs., 90 O.L. Abs. 584, 190 N.E. 2d 471 (Com.Pl., Franklin Co. 1962); Moore v. Dist. 50, UMW, O.L. Abs.____, 131 N.E. 2d 462 (Com.Pl. Franklin Co. 1954).

378. Plaintiff's amendment of his com-

plaint at the end of trial relates back to the date of filing of his original complaint, defendant having shown no prejudice by such relation back. Rule 15(c), Fed. R. Civ. P.; 3 Moore's Federal Practice ¶15.15[3]. Further, plaintiff is entitled to recover for a cause of action not raised in his pleadings if it is in fact proven at trial. E.g. Greene v. City of Memphis, 535 F.2d 976 (6th Cir. 1976).

379. 16 Am.Jur. 2d Conspiracy §60. See also Harper v. Union Sav. Assn., 429 F.Supp. 1254 (N.D. Ohio 1977); Devlin v. Webster, 68 O.L. Abs. 205, 114 N.E. 2d 762 (Com. Pl., Montgomery Co. 1950).

380. However, the Court notes Crawford v. Zeitler, 326 F.2d 119 (6th Cir. 1964) and Devlin v. Webster, supra.

381. Plaintiff's state court claims are not preempted by the National Labor Relations Act. Farmers v. Carpenters, ___ U.S. ___, 97 S.Ct. 1056, 51 L.Ed. 2d 338 (1977).

382. Findings of Fact ¶43,44,46.

383. The rule in the majority of jurisdictions is that a fraudulent concealment of a cause of action from the one in whom it resides, by the one against whom it lies, constitutes an implied exception to the statute of limitations, postponing the commencement of the running of the statute until discovery or reasonable opportu-

> nity of the discovery of the fact by the owner of the cause of action. Ohio courts, however, appear to have taken a divergent view, holding: a fraudulent concealment by which the plaintiff has been delayed will not enlarge the time for bringing an action; that with respect to actions controlled by the ordinary statute of limitations, if a defendant is guilty of fraudulent conduct which delays the plaintiff in filing his action beyond the period allowed, the plaintiff may nevertheless file his action and the defendant is estopped to set up the statute as a bar, and, that the statute is suspended from operation where the conduct of the defendant bordered on fraud. 10 O. Jur. 2d §93.

The Court is in accord with the majority rule. Further, plaintiff's release of defendants' agents Delaney and Grothaus does not release defendants as they were undisclosed principals.

384. E.g. Conclusions of Law ¶108(c)(d).

385. Plaintiff's Proposed Conclusions of Law ¶22.

386. Plaintiff has not raised any allegation regarding associational rights beside unlawful discipline. See 33 O. Jur. 2d Labor §75.

387. See generally 23 O.Jur. 2d Fiduciaries §§1-3.

388. Any demand on Possehl as Business Manager to bring suit would obviously have been futile.

389. O.R.C. §2305.09; Crawford v. Zeitler, 326 F.2d 119 (6th Cir. 1964); Conclusions of Law 108(d).

390. Conclusions of Law ¶105.

391. Conslusions of Law ¶112.

392. But see Archibald v. Local 57, I.U.O.E., 276 F.Supp. 226 (D.R.I. 1967).

393. Boilermakers v. Rafferty, 348 F.2d 307 (9th Cir. 1965), held that a plaintiff may not recover damages for emotional and mental distress absent contemporaneous physical injury. See Talvera v. Int. Bro. of Teamsters, supra. In the present case, plaintiff clearly suffered intimidation and physical injury as to entitle him to such damages.

394. See also Shimman v. Grothaus, supra.

395. The Court notes that it is virtually impossible to compute plaintiff's exact loss of wages due to defendants' manipulation of the referral process, requests, the disparity in operative skills and equipment qualifications among the various engineers, and the inability to completely restructure the employment orders and referrals over this period. However, by taking the average salary of those engineers of comparable skills as plaintiff, the

above variable factors should be substantially negated as to arrive at an accurate damage figure for lost wages.

396. This figure includes any compensatory damages due plaintiff for fines imposed at this trial.

397. The Court has struggled at some length in deciding not to permit Local 18 to conduct a trial de novo on the charges preferred against plaintiff by Blair. Magelssen v. Local 518, 233 F.Supp. 459 (W.D. Mo. 1964); contra Kiepura v. Local 1091 USW, 358 F. Supp. 987 (N.D. Ill. 1973). Blair's charges bear consideration and the Court's inclination is to, in effect, remand this portion of the instant proceeding to Local 18. However, the Court can discern no method of providing a fair and impartial jury that is assured of not having been tainted by defendants prior actions. As there is no way to determine the scope or effect of defendants' prior influence, the Court declines to order a trial de novo.

398. Naturally, the district officials have the option of permitting members to physically handle the deck in their own right.

399. The Court does not mean to imply that the authorities cited by plaintiff are not controlling.

400. Any claims not expressly dealt with within the context of this opinion are resolved in favor of defendants. To

be more specific, although plaintiff is entitled to pursue his state law remedies for any violations of Title IV, he has presented no argument in this regard. Further, the Court sees no reason at this time as to why the previously discussed federal precedent regarding 29 U.S.C. §481(c) would not be equally applicable to such state claims.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

WILLIAM F. MURPHY,	)	
	)	
Plaintiff	)	No. C 73-1336
	)	
v.	)	
	)	
LOCAL UNION NO. 18, 18A, 18B, 18C and 18RA, INTERNATIONAL UNION OF OPERATING ENGINEERS, et al.,	)	JUDGMENT
	)	
Defendants	)	

LAMBROS, DISTRICT JUDGE

In accordance with the foregoing Findings of Fact and Conclusions of Law, judgment is hereby entered in favor of plaintiff as follows:

1. Compensatory damages, to be assessed against defendants jointly and serverally, in amount equal to lost wages and benefits.

2. Compensatory damages, to be assessed against defendants jointly and severally, in the

sum of TEN THOUSAND DOLLARS ($10,000).

3. Punitive damages against defendant Possehl in the sum of THIRTY THOUSAND DOLLARS ($30,000).

4. Punitive damages against defendant Frank in the sum of TWENTY THOUSAND DOLLARS ($20,000).

5. Punitive damages against defendant Local 18 in the sum of ONE HUNDRED FIFTY THOUSAND DOLLARS ($150,000).

The purpose of a punitive damage award is to deter unlawful future conduct on the part of others as well as the perpetrator. The Court takes judicial notice of the fact that Possehl is now deceased. Therefore, the enforcement of the above award against him serves no purpose. It is accordingly vacated.

The Court's concern with respect to Frank and Local 18 is that the effects of a punitive damage award will

be of limited duration. The most effective means of achieving deterence in this case is the elimination of those practices and procedures which gave rise to this lawsuit. Therefore, the Court will defer execution of judgment and shall consider vacating the award of punitive damages as to these defendants provided that:

> 1. Frank agrees, through the submission of an appropriate written document, to refrain from seeking, campaigning, and holding any local or international office in the International Union of Operating Engineers for a period of five (5) years.
>
> 2. Local 18 submits to the Court within Thirty (30) days from entry of this order a plan, to be considered for adoption as an order of the Court, which will ensure that the channels of communication among and to the membership of Local 18 remain open and accessible to all serious candidates for union office without regard to platform, political affiliation, or

financial ability.

Although no findings are made of specific violations regarding the electoral process, the totality of the conduct of Local 18, including manipulation of the referral process, has resulted in suppressing dissident members from achieving any position of influence within the union. Although Local 18 has complied with the legal minimums required of it regarding membership access to union meetings, mailing lists, and publications, that in view of the geographic and operational structure of Local 18 enhanced avenues of communication within the union must be afforded in order to permanently remedy the difficulties presented by this lawsuit. The free and open exchange of knowledge, principles and ideals facilitates the

development of the democratic process upon which the American labor movement is founded. The Court expects this plan to address these concerns in a meaningful fashion.

By way of injunctive relief, judgment is further entered as follows:

1. Defendants shall expunge any and all record of plaintiff's charges, trial, conviction, suspension, and fine from the files of Local 18.

2. Defendants are permanently enjoined from interferring in any way with plaintiff's exercise of the rights afforded to him under the Bill of Rights, 29 U.S.C. §411.

3. Defendants are permanently enjoined from discriminating against plaintiff in the operation of the referral system.

4. In order to ensure against future misuse of the referral system, it is ordered that in every district of Local 18:

a. The employment referral cards of all members registering in the referral system

shall be stamped as to reflect the time and date of registration.

b. All work orders received by the respective district offices shall be stamped in the same fashion as the employment referral cards.

c. Each district office shall compile a list of the work orders received each day and shall post said list for at least seven (7) consecutive days in a conspicous manner in the district office, not less frequently than every one hundred twenty days. Original work orders used in compiling said lists shall be preserved for at least one year.

d. Immediately prior to, and immediately following each district meeting the referral deck shall be available to members for inspection and copying for a reasonable period of time. Members shall be entitled to inspect and copy the cards of those engineers before and after their own referral card, but shall not be entitled to handle the deck themselves.

This case is hereby terminated

and all other matters shall be considered on the post judgment docket.

IT IS SO ORDERED.

Thomas D. Lambros
United States District Judge

DATED: July 18, 1978

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

WILLIAM F. MURPHY, Plaintiff	)	No. C 73-1336
v.	)	
INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 18, et al., Defendants	)	POST-JUDGMENT MEMORANDUM AND ORDER

LAMBROS, DISTRICT JUDGE

On July 18, 1972 this Court entered its Findings of Fact and Conclusions of Law and Judgment in this matter. Since that time numerous post-judgment motions have been filed.

The time within which an appeal must be filed has been stayed pending resolution of the post-judgment motions and will begin to run from the date of

filing of this post-judgment order.

I. PLAINTIFF'S MOTION TO AMEND JUDGMENT I AND PLAINTIFF'S MOTION TO SUBSTITUTE EXECUTRIX FOR DECEASED DEFENDANT JOHN POSSEHL

Paragraph 128 of the Findings of Fact and Conclusions of Law awards Three Thousand Five Hundred Dollars ($3,500.00) damages against defendant Possehl payable to the treasury of Local 18. The award is not stated in the Judgment itself and plaintiff moves to amend the Judgment to reflect this award.

This Court views the award of damages against defendant John Possehl as essentially personal and punitive in nature. Defendants' opposition to plaintiff's motions points out that defendant Possehl is deceased. This Court shall not obligate the estate of defendant Possehl to pay a damage award that is personal and punitive in nature. Ac-

cordingly, this Court hereby vacates the Three Thousand Five Hundred dollar ($3,500.00) damage award against defendant John Possehl. This Court therefore views as moot plaintiff's Motion to Amend Judgment I and Motion to Substitute Executrix.

II. PLAINTIFF'S MOTION TO AMEND JUDGMENT II

Plaintiff moves this Court to order the defendant Union to prepare a summary of this Court's Findings of Fact and Conclusions of Law and Judgment, to submit the summary for approval by this Court, and to disseminate the approved summary to the Union membership by publication or by mail. Plaintiff asserts that such summarization and distribution is necessary to more fully vindicate his rights and remedy his injury.

Defendants' brief in response

indicates that the news media in Cleveland, Columbus, Cincinnati, Akron and Ashtabula publicized plaintiff's victory. Defendants also point out that the Buckeye Engineer, the Union newspaper, has reported the status of the case and has done so without editorial comment. Additionally, defendants argue that the judgment alone vindicates plaintiff's rights and provides him with a remedy and that the judgment is subject to appellate review.

Plaintiff counters defendants' arguments by pointing out the adverse publicity to which he was subjected by the Buckeye Engineer. He asserts that publication of such a summary in the newspaper is therefore necessary to "expunge" his Union record, which defendants are required to do pursuant

to the Judgment. Plaintiff also informs this Court that the Toledo media and the Kentucky media did not publicize the judgment.

Plaintiff's Motion to Amend Judgment II is denied. The Findings of Fact and Conclusions of Law and the operation of the Judgment fully and precisely describe the basis for defendants' liability and provide a remedy for plaintiff's injury. Moreover, to compel publication in the media, either printed or electronic, of any newsworthy topic is repugnant to this Court. Notwithstanding the potential remedial effect of the publication plaintiff seeks, this Court views any such publication as an encroachment on the first amendment rights of the Buckeye Engineer.

III. MOTION TO VACATE AWARD OF PUNITIVE DAMAGES AGAINST DEFENDANT FRANK

In its Judgment this Court indicated that it would consider vacating the punitive damages award against defendant John Frank in the event:

> Frank agrees, through the submission of an appropriate written document, to refrain from seeking, campaigning, and holding any local or international office in the International Union of Operating Engineers for a period of five (5) years.

Defendant Frank on April 3, 1981 filed with this Court an affidavit stating that he agrees to refrain from seeking, campaigning for or holding any International Union of Operating Engineers office for a period of five years. Accordingly, defendant Frank shall not seek, campaign for or hold any Union office during the five (5) year period

following the date of entry of this order. The award of punitive damages against defendant Frank is hereby vacated.

IV. PLAINTIFF'S MOTION TO WITHDRAW ORIGINAL SUBMISSION ON ISSUE OF COMPUTATION OF DAMAGES TO WHICH PLAINTIFF IS ENTITLED AS A RESULT OF LOST EARNINGS AND SUBSTITUTE IN ITS PLACE A REVISED SUBMISSION

Paragraph 127(b) of the Findings of Fact and Conclusions of Law outlined the guidelines by which plaintiffs compensatory damages are to be calculated. With regard to lost wages, Paragraph 127(b)(1) states:

> Lost wages for the period of April 1, 1970 to September 1, 1973, to be computed by subtracting plaintiff's total income for this period, as reflected by plaintiff's federal income tax returns, from the average total income earned in this period by those engineers registered in the same referral deck as plaintiff.395/

> Pro-rations shall be made where necessary to accurately reflect this damage figure.

Footnote 395 states:

> 395. The Court notes that it is virtually impossible to compute plaintiff's exact loss of wages dut to defendants' manipulation of the referral process, requests the disparity in operative skills and equipment qualifications among the various engineers, and the inability to completely restructure the employment orders and referrals over this period. However, by taking the average salary of those engineers of comparable skills as plaintiff, the above variable factors should be substantially negated as to arrive at an accurate damage figure for lost wages.

Plaintiff filed his original calculations regarding lost wages on December 4, 1979. Defendants objected to various portions of the calculations by filing the affidavit of expert witness Dr. Robert N. Baird on November 3, 1980. Plaintiff has moved this Court for leave to withdraw his original computations

and submit revised computations. Defendants have filed nothing in opposition to this motion. Plaintiff is hereby granted leave to file with this Court his revised computations.

V. PLAINTIFF'S MOTION TO ALLOW EXPERT FEES TO BE TAXED AS COSTS AGAINST DEFENDANT UNION AND DEFENDANTS' MOTION TO STRIKE PLAINTIFF'S MOTION AND AFFIDAVIT OF PLAINTIFF'S COUNSEL

Plaintiff has received invoices for economic statistical services rendered by his two expert witnesses and consultants, Dr. John F. Burke and Dr. J. Berettoni. Plaintiff now moves this Court to order defendants to bear the costs of these experts' services. Plaintiff asserts that the "(s)ervices rendered by these experts were reasonably and necessarily incurred in preparation of reports necessary to the

proof of discrimination in employment referrals by defendant Union and in the computation of the lost wages to which plaintiff is entitled." Defendants' motions to strike and supporting brief will be considered as an argument in opposition to plaintiff's motion.

Plaintiff contends that this Court may, pursuant to Rule 54(d), Fed. R. Civ. P., exercise its discretion and order that defendants bear the costs of these services. The Supreme Court of the United States, however, has specifically ruled that with respect to a prevailing party's expert witness fees a District Court has no such discretion. Henkel v. Chicago, St. Paul, Minneapolis and Omaha Railway Company, 284 U.S. 444 (1932).

In Henkel the Court recognized

that Congress had specifically prescribed by statute the amounts payable and taxable as witness fees. The Court reasoned that Congress had dealt with the matter comprehensively, that it had made no provision for the award of expert witness' fees, and that District Courts were bound by the purview of the statute.

The Henkel decision specifically prohibits District Courts from taxing as costs the fees of the expert witnesses of the prevailing party. Plaintiff's motion is therefore denied.

VI. DEFENDANTS' MOTION TO VACATE OR AMEND JUDGMENT

Defendants have moved this Court to vacate that portion of its Judgment based on violations of plaintiff's rights under 29 U.S.C. §411 which were redressed by application of 42 U.S.C.

§1985(3).

Defendants' first argument in support of their motion to vacate is based on Great American Savings and Loan Association v. Novotony, 442 U.S. 366 (1979). Defendants assert that Novotony stands for the proposition that only deprivations of constitutional rights may be remedied through §1985(3). There having been no finding of a violation of plaintiff's constitutional rights in this Court's decision, defendants argue that the portion of the Judgment based on §1985(3) must be vacated.

This Court however, does not read Novotony so broadly. Novotony held that violations of rights created by Title VII of the Civil Rights Act of 1964 may not be remedied through §1985 (3). The Supreme Court's objective was

to prevent litigants who seek to vindicate rights created by Title VII from circumventing the comprehensive administrative procedures and remedies of Title VII by employing the remedy of §1985(3). The Supreme Court nowhere stated that violations of rights created by statute may not be remedied through §1985(3). Although Justice Powell did indicate in his concurring opinion that he would prefer to restrict the application of §1985(3) to redressing violations of constitutional rights, a majority of the Supreme Court has never taken such a position.

That Novotony does not compel this Court to vacate that portion of its Judgment based on §1985(3) becomes more evident when one notes that Congress did not establish an elaborate

administrative remedial procedure through which the rights created by 29 U.S.C. §411 are to be vindicated. In direct contrast to the mandatory administrative procedures through which violations of rights created by Title VII must be remedied, 29 U.S.C. §412 enables a person to bring a civil action in District Court to redress violations of §411 rights.

In addition, the remedies established in Subchapter II of Chapter 11 of Title 29 of the United States Code (29 U.S.C. §§411-415; the Bill of Rights of Members of Labor Organizations) in no way limit the "remedies of any member of a labor oraganization under any State or Federal law. . . ." 29 U.S.C. §413. The remedies established in the Bill of Rights of Members of Local Organizations

are clearly intended to be cumulative and not exclusive. The cumulative nature of the remedies by which violations of the rights established in §411 may be redressed is in direct contrast to the exclusive nature of the administrative remedies by which violations of the rights created by Title VII must be redressed pursuant to Novotony.

In short, Novotony does not compel the conclusion that §411 rights may not be remedied through §1985(3). No comprehensive administrative remedial procedure is circumvented when a litigant is permitted to vindicate §411 rights through §1985(3). Indeed, the remedies established in the Bill of Rights of Members of Labor Organizations are meant to be cumulative and not exclusive. Defendants' first argument is

therefore rejected.

Defendants' other arguments are based on Browder v. Tipton, 630 F.2d 1149 (6th Cir. 1980).

Plaintiffs in Browder were employees of a freight line company who had been assigned to deliver fuel to a Cities Service plant in Tennessee. Defendants, four employees of Cities Service and their labor union, were picketing the Cities Service plant at the time plaintiffs sought to deliver their cargo. An altercation occurred between plaintiffs and one of the defendants at the time plaintiffs sought to cross the picket line. At a point later in time, defendants caused plaintiffs to be arrested by making false statements to a Magistrate.

Plaintiffs filed suit in Dis-

trict Court alleging that their civil rights had been violated and sought redress pursuant to §1985(3). Plaintiffs claimed to be members of a "class comprised of non-Cities Service personnel attempting to carry on business with Cities Service during the course of the strike." 630 F.2d at 1151. Plaintiffs argued that defendants had "violated §1985(3) by causing false arrests[3] for the purpose of discriminating against members of this class." Id. (footnote omitted). The District Court dismissed the complaint and the Sixth Circuit affirmed.

In support of the motion to vacate, defendants initially argue that Browder holds that Novotony precludes the enforcement of the Federal labor laws through §1985(3). Defendants

point to the following footnote to support their contention:

> We assume the sole deprivation is that of liberty-arrest without probable cause in violation of the Fourth Amendment. We recognize that defendants' alleged actions in interfering with a supplier's crossing a picket line may well have violated the Labor-Management Relations Act of 1947, as amended, see 29 U.S.C. Section 158(b) (4) (ii) (B) (1976). But redress of this infringement must be sought by way of the labor act's administrative scheme. Cf. Great Am. Fed. Sav. & Loan Ass'n v. Novotony, 442 U.S. 366, 99 S.Ct. 2345, 60 L.Ed. 2d 957 (1979) (Title VII action cannot be brought by way of Section 1985). Accordingly, we address only the infringement of liberty.

Id. n. 3.

This Court does not agree with defendants' argument. Notwithstanding the availability of §1985(3) to remedy conspiratorial violations of federal statutory rights that must be remedied through mandatory and exclusive administrative procedures, this Court concludes

that violations of §411 rights, for which there are no exclusive administrative remedies, may be remedied through &1985(3). Remedies for violations of §411 rights are intended to be cumulative, 29 U.S.C. §413, and are to be pursued in the District Courts rather than through an exclusive administrative scheme. 29 U.S.C. §412.

Defendants next argue that Browder prevents this Court from concluding that the dissident faction of Local 18 is a "class" within the meaning of §1985(3). A fortiori, defendants contend, plaintiff could not have been the target of "some racial or otherwise class based invidiously discriminatory animus" within the meaning of Griffin v. Breckenridge, 403 U.S. 88 (1970).

The Sixth Circuit articulated in

Browder guidelines concerning the definition of classes entitled to protection under §1985(3). The Court stated:

> We hold that the class of individuals protected by the "equal protection of the laws" language of this statute are those so called 'discrete and insular' minorities that receive special protection under the Equal Protection Clause because of inherent personal characteristics. The persons protected under the "equal privileges and immunities" language of the statute are those individuals who join together as a class for the purpose of asserting certain fundamental rights.

Browder v. Tipton, supra, at 1150.

Recognizing that plaintiffs had been denied the fundamental right to remain at liberty from state confinement absent probable cause for arrest, the focus of the Court's analysis was whether a "particular exercise of a fundamental right in a class-based manner" was the basis for the discrimination.

Id. at 1153. The Court concluded that, although they may have been within a class recognized and protected by the Labor Management Relations Act, plaintiffs had not "suffered class-based discrimination on account of a peculiar exercise of a fundamental right." Id. (emphasis in original).

The situation that confronted this Court, however, was quite different than that in Browder. This Court's Findings of Fact and Conclusions of Law indicates that the basis for defendants' discrimination against plaintiff was his membership in the dissident faction of Local 18 and his seeking to exercise his §411 rights as a member of that faction. This Court concluded that plaintiff was discriminated against on account of the exercise of his §411

rights as a member of the dissident faction of Local 18.

Furthermore, in Browder the Sixth Circuit stated:

> Following Griffin our Court has been faced at least eight times with groups claiming protection under §1985. Among the legitimate §1985(3) classes we have included supporters of a sheriff's political opponent, Cameron v. Brock, 473 F.2d 608 (6th Cir. 1973), [and] anti-Nixon demonstrators, Glasson v. City of Louisville, 518 F.2d 899 (6th Cir.), cert. denied, 423 U.S. 930, 96 S.Ct. 280, 46 L.Ed.2d 258 (1975). . . .

Id. at 1152. The Court also indicated why it considered these classes as protected under §1985(3):

> Discriminating only against . . . anti-Nixon demonstrators, (Glasson), or particular local candidates (Cameron), deprives these groups of the peculiar manner in which they exercise their "fundamental right" of free speech.

Id. at 1154.

In light of the continuing vitality of such classes under §1985(3) in the Sixth Circuit, it appears that the dissident faction of Local 18 is properly considered a class protected by §1985(3). This Court's Findings of Fact and Conclusions of Law clearly indicates that defendants' discrimination against plaintiff on account of his membership in the dissident faction deprived him of the peculiar manner in which he exercised his §411 rights. Furthermore, that plaintiff's rights of free speech, freedom of assembly, and freedom of association are statutory, 29 U.S.C. §411, makes them no less "fundamental" as the Court in Browder employed that term.

Defendants' arguments based on Browder are rejected. Futhermore, this

Court having found defendants' arguments in support of the motion unpersuasive, defendants' motion to vacate that portion of the Judgment based on 42 U.S.C. §1985(3) is denied.

VII. DEFENDANTS' MOTION TO FILE SUPPLEMENTAL REPLY BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO VACATE OR AMEND THE COURT'S CONDITIONAL JUDGMENT

Having denied defendant's motion to vacate or amend in Part VI of this Memorandum Opinion and Order, this Court views as moot defendants' motion for leave to file a supplemental reply brief in support of said motion.

VIII. DEFENDANTS' MOTION FOR WRITTEN RULINGS ON EVIDENTIARY OBJECTIONS RAISED DURING THE VIDEOTAPE PORTION OF TRIAL.

Having determined that this Court based its Findings of Fact and Conclusions of Law on only that evidence which was both relevant and admissible, all

evidentiary objections raised during the videotape portion of the trial are hereby overruled.

IX. PLAINTIFF'S ATTORNEYS' FEES

Plaintiff has formally moved this Court for an award of reasonable attorneys' fees and has advanced several arguments in support of his motion. Plaintiff's attorneys have filed their affidavits documenting time spent on the case and the affidavits of attorneys in the community regarding hourly rates.

A. WHETHER PLAINTIFF IS ENTITLED TO REASONABLE ATTORNEYS' FEES

Reasonable attorneys' fees may be awarded in suits brought pursuant to 29 U.S.C. §412 to vindicate the rights enumerated in 29 U.S.C. §411. Hall v. Cole, 412 U.S. 1 (1973). The Court in Hall indicated that such an award is proper either when the plaintiff's

vindication of his rights resulted in a common benefit to the union or its members. In this case, plaintiff is entitled to an award of attorneys' fees under both of the theories articulated in Hall.

In support of an aggregate punitive damage award of two hundred thousand dollars ($200,000), this Court specifically found:

> These defendants have intentionally, willfully and maliciously moved on all fronts to suppress plaintiff as a member of the dissident faction of Local 18.

Findings of Fact and Conclusions of Law, July 18, 1978, at 131-132. Such a finding of defendants' malicious conduct supports an award of attorneys' fees under the "malicious conduct" theory stated in Hall. That the awards of punitive damages were subject to being

vacated upon certain conditions in no way precludes the finding of maliciousness from serving as a basis for an award of reasonable attorneys' fees.

With regard to the "common benefit" theory, the Court in Hall succinctly articulated the underlying rationale:

> Another established exception [to the American Rule that prevailing parties are not entitled to an award of attorneys' fees] involves cases in which the plaintiff's successful litigation confers "a substantial benefit on the members of an ascertainable class, and where the court's jurisdiction over the subject matter of the suit makes possible an award that will operate to spread the costs proportionately among them." Mills v. Electric Auto-Lite, [396 U.S. 375, 393-394 (1970)]. "Fee Shifting" is justified in these cases, not because of any "bad faith" of the defendant but, rather, because "[t]o allow the others to obtain full benefit from the plaintiff's efforts without contributing equally to the litigation expenses would be to enrich the others unjustly at the plaintiff's expense."

Id., at 392. . . .

Hall v. Cole, supra, at 5-6 (footnote omitted).

The Court also indicated:

> the rationale of these cases must logically extend, not only to litigation that confers a monetary benefit on others, but also to litigation "'which corrects or prevents an abuse which would be prejudicial to the rights and interests'" of those others.

Id., at 5 n. 7, quoting Mills v. Electric Auto-Lite Co., 396 U.S. 375, 396 (1970).

Plaintiff in Hall was a member of the Seafarers International Union of North America who had been discharged from the union after he had introduced a set of resolutions alleging instances of undemocratic actions and shortsighted policies on the part of union officers. The discharge was determined to have been in violation of his §411 right of

free speech and he was ordered permanently reinstated to membership in the union. Although his monetary damage claims were denied, the District Court awarded him attorneys' fees under the "common benefit" theory. In upholding the Court of Appeals' affirmance of the District Court's award of attorneys' fees, the Supreme Court stated:

> . . . there can be no doubt that, by vindicating his own right of free speech guaranteed by §101 (a)(2) of Title I of the LMRDA, [plaintiff] necessarily rendered a substantial service to his union as an institution and to all of its members. When a union member is disciplined for the exercise of any of the rights protected by Title I, the rights of all members of the union are threatened. And, by vindicating his own right, the successful litigant dispels the "chill" cast upon the rights of others. Indeed, to the extent that such lawsuits contribute to the preservation of union democracy, they frequently prove beneficial "not only in the immediate impact of the results achieved but

> in their implications for the future conduct of the union's affairs."

Id., at 8, quoting Yablonski v. United Mine Workers of America, 466 F.2d 424, 431 (1972).

The situation in Hall is analogous to that in this case. Through plaintiff's vindication of his §411 rights, a series of reforms benefiting all members was initiated within Local 18.

It was this Court's intention that plaintiff's vindication of his §411 rights would effectively restore democracy to Local 18. This Court's goal in fashioning a remedy to redress the violations of plaintiff's §411 rights was to make Local 18 a more effective bargaining agent for its members and to assure them a full and fair opportunity

to participate in union government and administration. See Preface to Findings of Fact and Conclusions of Law, July 18, 1978. The injunctive relief insuring against future misuse of the referral system, See Judgement, July 18, 1978, at 3, and the condition precedent imposed upon Local 18 to this Court's vacating the punitive damages against it, See Judgment, July 18, 1978, at 2 (Local 18 to submit for Court approval a plan to improve communication among and to the membership with regard to all serious candidates for Local 18 office without regard to platform, political affiliation, or financial position established as condition precedent to Court's vacating punitive damages against Local 18), do in fact confer a common benefit on the members of Local

18.

Plaintiff's success in this case conferred a substantial benefit on an ascertainable class, the members of Local 18, and an award of attorneys' fees against Local 18 will operate to spread the costs proportionately among them. Without such an award of attorneys' fees against Local 18 and Local 18's spreading the cost among its members through union membership dues, the members of the union would fully benefit from plaintiff's efforts without contributing to the litigation expense.

Defendants argue that, based on Alyeska Pipeline Service Co. v. The Wilderness Society, et al., 421 U.S. 420 (1975), plaintiff is not entitled to an award of reasonable attorneys' fees. Defendants contend that Alyeska

Pipeline requires plaintiff either to have affected the statutory rights of all citizens or to have implemented public policy through the vindication of his rights in order to recover an award of reasonable attorneys' fees. Such an argument fails to recognize that Alyeska Pipeline was specifically limited to the "private attorney general" theory for awarding attorneys' fees. The Court in Alyeska Pipeline indicated that neither the "malicious conduct" theory nor the "common benefit" theory was under consideration in that case. With regard to the "malicious conduct" and "common benefit" theories, the Court specifically stated:

> These exceptions [to the American Rule] are unquestionably assertions of inherent power in the courts to allow attorneys'

> fees in particular situations, unless forbidden by Congress, but none of the exceptions is involved here.

421 U.S. at 259 (footnote omitted).

This Court's award of attorneys' fees under the rationale of Hall v. Cole, supra, is expressly predicated on the "malicious conduct" theory and the "common benefit" theory. The "private attorney general" theory at issue in Alyeska Pipeline is not involved in this case. Defendants' arguments based on Alyeska Pipeline are therefore rejected as inapposite.

The second basis for awarding plaintiff reasonable attorneys' fees is the Civil Rights Attorney's Fees Awards Act of 1976. The statute provides, in pertinent part:

> In any action or proceeding to enforce a provision of [section] . . . 1985 . . . of this title,

> . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

42 U.S.C. §1988 (1976). Having denied at Part VI of this Memorandum Opinion and Order defendants' motion to vacate that portion of the Judgment based on 42 U.S.C. §1985(3), plaintiff has prevailed on his claim to enforce his §411 rights through §1985(3) and is entitled to reasonable attorneys' fees pursuant to §1988.

Another issue raised by defendants is whether the involvement of the Legal Aid Society is a basis for denying plaintiff an award of reasonable attorneys' fees. This Court concludes that the involvement of the Legal Aid Society is not a basis for denying the award. Incarcerated Men of Allen County Jail v.

Fair, 507 F.2d 281, 286 (6th Cir. 1974).

As a final note on whether plaintiff is entitled to reasonable attorneys' fees, that one of his counsel is a law school professor is not a basis for denying the award. Cf. Johnson v. Snyder, 470 F.Supp. 972, 975 (N.D. Ohio 1979) (attorney's fees awarded to law school professor who successfully represented plaintiff in action pursuant to Fair Housing Act).

Summarizing, plaintiff is entitled to an award of reasonable attorneys' fees under the "malicious conduct" and the "common benefit" theories as established in Hall v. Cole, supra, and under 42 U.S.C. §1988 (1976). That one of plaintiff's attorneys was affiliated with the Legal Aid Society and the other is a law school professor does not

affect the award.

B. CALCULATION OF THE AMOUNT OF REASONABLE ATTORNEYS' FEES TO WHICH PLAINTIFF IS ENTITLED.

In Northcross v. Board of Education of Memphis City Schools, 611 F.2d 624 (6th Cir. 1979), the Sixth Circuit articulated guidelines by which attorney's fees awards pursuant to the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988, were to be calculated.

The Court's introductory remarks indicated:

> This Court has been disturbed by the extraordinary variations in fee awards that have come before it on review, and by a marked failure on the part of the district courts to explain their reasoning, make necessary findings of fact, or demonstrate the calculations used to arrive at a fee. Such awards may well constitute an abuse of discretion while rendering the award virtually unreviewable. We

> therefore conclude that a uniform approach to awarding fees, with a requirement that the district court make clear and adequate findings of fact on the record, is necessary in order that we may discharge our statutory duty to award a "reasonable" fee. That which is arbitrary or conclusory is not reasonable, and is not fair to either of the parties involved.

611 F.2d at 636. While Northcross involved only an award pursuant to the Fees Awards Act of 1976, in an effort to achieve the "uniform approach" of which the Sixth Circuit spoke, this Court will apply the Northcross analysis even though plaintiff is entitled to fees under both the 1976 Act and the principles of Hall v. Cole, supra.

On October 2, 1980, both parties appeared before this Court for an informal post-judgment conference. At that conference the parties' counsel indicated that both parties were amenable to

leave the determination of attorneys' fees to this Court on the record as it existed at that time and without further hearing, subject to plaintiff's filing with this Court affidavits of attorneys regarding prevailing hourly rates for similar services in the Greater Cleveland area. Plaintiff filed with this Court on November 3, 1980 the affidavits of William Martin Greene, attorney-at-law, and Robert P. Duvin, attorney-at-law.

Defendants supplemental brief filed on October 24, 1980 addresses the amount of attorneys' fees to which plaintiff is entitled. Defendants' arguments include an itemized analysis of plaintiff's claim under the checklist of factors established in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714

(5th Cir. 1974). In Northcross, however, the Sixth Circuit expressly rejected the Johnson checklist approach to calculating attorneys' fees. 611 F.2d at 642-643. Nevertheless, defendants' arguments will be considered and evaluated as this Court applies the principles and analytical framework of Northcross.

1. Hours of Service Provided

Northcross indicated that the District Court's analysis must first focus on the affidavits of counsel. The District Court need not automatically accept the hours claimed in such affidavits.

> In complicated cases, involving many lawyers, we have approved the arbitrary but essentially fair approach of simply deducting a small percentage of the total hours to eliminate duplication of services.

* * *

> Beyond this allowance for duplicative services, however, we hold that if a district court decides to eliminate hours of service adequately documented by the attorneys, it must identify those hours and articulate its reasons for their elimination.

611 F.2d at 636-637 (citation omitted).

In support of his motion plaintiff has filed the affidavits of his two attorneys, Alan Miles Ruben and Edward R. Stege, Jr. The chart on the next page accurately summarizes the number of hours documented in the affidavits of attorneys Stege and Ruben.

(The balance of this page has been left blank intentionally)

EDWARD R. STEGE, JR.

CALENDAR YEAR	OFFICE	LITIGATION	TOTAL
1973	14	0	14
1974	25.5	3	28.5
1975	48	7	55
1976	199.5	129.0	328.5
1977	54	2	56
			482.0

ALAN MILES RUBEN

CALENDAR YEAR	OFFICE	LITIGATION	TOTAL
1977	120	0	120
1974	98	3	101
1975	167.5	6.5	174
1976	385	190	575
1977	165.5	2	167.5
1978	74.5	0	74.5
1979	19.5	0	19.5
1980	10	3	13
			1244.5

(The balance of this page has been left blank intentionally)

The "Office" category in the above chart includes preparation for interviews and meetings, attendance at interviews and meetings, trial preparation, preparation for depositions, research, writing, and similar office activities. The "Litigation" category reflects attendance at depositions, trial, and conferences with the Court.

Having reviewed the affidavits of attorneys Stege and Ruben, this Court concludes that they neither claimed unjustified hours nor duplicated each other's services. This Court will neither deduct hours for cause nor arbitrarily deduct a small percentage of the total hours for suplication of services. This Court finds that the hours for which attorneys Stege and Ruben are entitled to compensation are accurately

summarized in the above chart.

2. Hourly Rate and Calculation of Fees

In Northcross, the Sixth Circuit indicated that the District Court should focus its inquiry on the fair market value of the services provided. When considering fees for attorneys who do not maintain a private practice, the Court indicated that rates customarily charged in the community may be consulted for guidance.

To aid this Court in determining the reasonable hourly rate for legal services in the Greater Cleveland area for the period 1973-1980, counsel for the parties have submitted their respective affidavits and the affidavits of four attorneys not involved in this case. The contents of those affidavits

are summarized in the chart on the next page.

(The balance of this page has been left blank intentionally).

	GREENE[1]	DUVIN[2]	BEYER[4]
1973	$ 50	60/70	-[9]
1974	$ 50	60/70	-
1975	$ 75	70/80	-
1976	$ 75	70/80	70
1977	$ 75	90/110[3]	70
1978	$100	90/110[3]	82
1979	$100	110/135[3]	-
1980	$100	110/135[3]	93

	BUTLER[5]	STEGE[6]	RUBIN[7]	FADEL[8]
1973	$ -	55	65	-
1974	$ -	55	75	-
1975	$ -	65	85	-
1976	$ 65	70	85	-
1977	$ 65	75	85	50
1978	$ -	-	100	50
1979	$ -	-	100	50
1980	$ -	-	100	50

1/William F. Green: Senior partner

of Fink and Greene Co., L.P.A. Admitted to California Bar in 1971 and Ohio Bar in 1972. Figures reflect his regular hourly rates.

2/ Robert P. Duvin: Senior partner of Duvin, Flinker and Cahn. Admitted to Indiana Bar in 1961 and Ohio Bar in 1963. Earned L.L.M. from Columbia University in 1963. Figures reflect his regular hourly rates designated by (office rate/litigation rate).

3/ Average figures.

4/ William D. Beyer: Engaged in full-time practice of law since 1978. Employed by Jones, Day, Reavis and Pogue, Cleveland, Ohio from 1978 to 1980. 1976 and 1977 figures are based on his personal experience and judgment. 1978 and 1980 figures are based on the hourly rate Jones, Day, Reavis and Pogue billed clients for his services.

5/ Dennis F. Butler: Engaged in the full-time practice of law since being admitted to the Ohio Bar in 1970.

6/ Edward R. Stege, Jr.: Plaintiff's counsel. Director of the Law Reform Office of the Legal Aid Society during his involvement with this case. Admitted to the Ohio Bar in 1968. Figures reflect his standard billing rate.

7/ Alan Miles Ruben: Plaintiff's counsel. Professor of Law, Cleveland-Marshall College of Law, Cleveland, Ohio. Admitted to Pennsylvania Bar

in 1957 and Ohio Bar in 1971. Figures reflect his standard billing rate during fiscal years running from July to June of the following year.

8/ William I. Fadel: Defendants' counsel. Admitted to Ohio Bar in 1969. Figure reflects hourly rate charged his clients for litigation.

9/ A dash (-) indicates that the individual's affidavit did not state a figure for the particular year.

Having reviewed the affidavits summarized in the above chart, it appears that attorney Stege's hourly rates as stated in his affidavit are reasonable for an attorney of his experience during the period of time he was involved in this case.

Attorney Stege is therefore entitled to thirty three thousand one hundred seven dollars and fifty cents (33,107.50) in attorney's fees calculated as follows:

CALENDAR YEAR	TOTAL HOURS	HOURLY RATE	TOTAL
1973	14	$55	$ 770.00
1974	28.5	55	1,567.50
1975	55	65	3,575.00
1976	328.5	70	22,995.00
1977	56	75	4,200.00
			$33,107.50

With regard to attorney Ruben, it appears that for the most part the hourly rates stated in his affidavit are in accord with the community standards for an attorney of his experience. For calendar years 1975 and 1976, however, attorney Ruben's rate of eighty five dollars ($85.00) per hour is slightly excessive. This is particularly evident when the rate is compared with the hourly rates of attorney Robert P. Duvin, the attorney most comparable to Ruben with respect to experience and years as

an attorney, for the same time periods. Accordingly, for services rendered during 1975 and 1976 attorney Ruben's fees shall be computed at eighty dollars ($80.00) per hour.

Attorney Ruben is entitled to one hundred thousand two hundred thirty two dollars and fifty cents ($100,232.50) in attorney's fees calculated as follows:

CALENDAR YEAR	TOTAL HOURS	HOURLY RATE	TOTAL
1973	120	$ 65	$ 7,800.00
1974	101	75	7,575.00
1975	174	80	13,920.00
1976	575	80	46,000.00
1977	167.5	85	14,237.50
1978	74.5	100	7,450.00
1979	19.5	100	1,950.00
1980	13	100	1,300.00
			$100,232.50

3. Costs and Expenses

Attorney Stege has filed an affidavit documenting the litigation costs incurred in this case by the Legal Aid Society of Cleveland.

In Northcross the Sixth Circuit recognized that some expenses are included in the concept of attorneys' fees as they are necessarily incurred while furnishing effective representation. Among the items included in this category are photocopying, travel expenses, and telephone costs. The Court also noted that District Courts have discretion pursuant to 28 U.S.C. §1920 to tax as costs items such as stenographic transcripts from court reporters and witness fees.

This Court has examined attorney Stege's affidavit documenting the Legal

Aid Society's expenses. Defendants have filed no specific challenges to the amounts designated therein. This Court concludes that all items designated in attorney Stege's affidavit are properly taxable as costs within this Court's discretion. This Court therefore awards to the Legal Aid Society of Cleveland its costs of one thousand eight hundred twenty one dollars and forty six cents ($1,821.46) as itemized in attorney Stege's affidavit.

C. PLAINTIFF'S MOTION FOR LEAVE TO FILE SUPPLEMENTAL AFFIDAVIT IN SUPPORT OF PLAINTIFF'S MOTION FOR ATTORNEY FEES

Having determined the reasonable fees to which plaintiff's counsel are entitled, plaintiff's motion for leave to file a supplemental affidavit regarding the hourly rates in the community is moot.

X. DEFENDANT LOCAL 18's PROPOSED PLAN FOR COURT ADOPTION AND PLAINTIFF'S MOTIONS FOR CONTEMPT SANCTIONS

In its Judgment, this Court indicated that it would consider vacating the punitive damage award against Local 18 provided:

> Local 18 submits to the Court within Thirty (30) days from entry of this order a plan, to be considered for adoption as an order of the Court, which will ensure that the channels of communication among and to the membership of Local 18 remain open and accessible to all serious candidates for union office without regard to platform, political affiliation, or financial ability.

Judgment, July 18, 1978 at 2. On October 17, 1978 defendant Local 18 submitted such a proposed plan and requested that this Court vacate the punitive damage award against it. The proposed plan was comprised of three parts: A. Purposes and Principles; B. Referral

Procedures, and C. Membership Rights and Union Elections. The parties have each filed extensive memoranda addressing the proposed plan and whether this Court should approve it.

On September 15, 1981 plaintiff moved for contempt sanctions against Local 18 on the ground that it had failed to comply with the injunctive relief regarding the referral system set forth in this Court's July 18, 1978 Judgment. Local 18 conceded that it had not implemented the injunctive relief, but asserted that it was under the impression that implementation was conditional pending this Court's final decision on the proposed plan. On November 30, 1981 this Court expressed its view that the injunctive relief regarding the referral system was not conditional and

ordered Local 18 to immediately and fully implement said injunctive relief. This Court, however, did not grant plaintiff's motion for sanctions inasmuch as it recognized Local 18's position on the timing of the injunctive relief was not taken in bad faith.

Plaintiff again moved for contempt sanctions on February 1, 1982 on the ground that Local 18 had failed to immediately implement the injunctive relief in accordance with this Court's order dated November 30, 1981, as amended by order dated December 2, 1981. A conference was held at which plaintiff's motion was discussed. The parties presented their respective views on the injunctive relief and the integrity of the referral system in general. The parties also indicated that they would

be willing to explore whether a negotiated resolution of the implementation of the referral system injunctive relief could be achieved. This Court then referred the parties to Magistrate David S. Perelman for discussions concerning the referral system and the meaningful implementation of the injunctive relief in this Court's Judgment.

This Court also informed the parties that it perceived as the object of this injunctive relief to insure that the mechanism by which Local 18 members could ascertain whether the system was being fairly administered. With this in mind, the parties entered into months of negotiations before Magistrate Perelman and arrived at the following agreement with respect to the referral system:

REFERRAL SYSTEM AGREEMENT

"WHEREAS, this Court entered, on July 18, 1978, a judgement granting the plaintiff injunctive relief regarding the defendant Union's operation of the exclusive hiring hall job referral system established in collective bargaining agreements between the Union and various employer associations; and

"WHEREAS, plaintiff filed a Motion for Contempt Sanctions on September 15, 1971 against the defendant Union; and

"WHEREAS, on November 30, 1981, this Court issued a Post-Judgment Order, which was amended by the Court on December 2, 1981; and

"WHEREAS, plaintiff filed a Supplemental Motion for Contempt Sanctions on February 1, 1982; and

"WHEREAS, the Court has issued an order of reference to a Magistrate of the District Court to develop the terms of the settlement in order to implement the Court's injunctive orders regarding the operation of the exclusive job referral system maintained by the defendant Union and various employer associations, to obtain the agreement of the parties thereto, and to incorporate such terms in an order for adoption by the Court; and

"WHEREAS, the officers of The International Union of Operating Engineers, Local 18, signatory to this consent decree, were not defendants in the case of William F. Murphy v. International Union of Operating Engineers, Local 18, et. al., Case No. C 73-1336, and the Court has made no adjudication

as to their conduct;

"NOW, THEREFORE, the defendant Union, without admitting liability, and preserving all rights to appeal at such time as a final judgment is entered by the Court, including but not limited to the right of the defendant to seek a stay of the Court's Order pending appeal, and to vacate this Court's punitive damage award of $150,000.00, and the plaintiff, without waiving his rights of appeal or to oppose such Motions if filed by defendant, hereby agree as follows:

"1. The exclusive hiring hall system, as established in existing collective bargaining agreements between the Union and various Employer Associations and maintained by the defendant Union in each of the six districts,

shall be operated fairly, consistently, and reasonably, so as not to favor any individual or group or individual registrants because of their allegiance or relationship to or affiliation with the Union, its members, officers, business agents, or other employees or representatives, and not to discriminate against any individual referral registrants because of their allegiance or relationship to or affiliation with other members, or opposition, lack of allegiance, or relationship to, or affiliation with the officers, employees, business agents, and other representatives of the defendant Union. Referrals made pursuant to the exclusive hiring hall shall be based solely upon job qualifications as reflected in the registrants' cards.

"2. No officer, business agent, employee, or other representative of the defendant Union shall, directly or indirectly, whether personally or through intermediaries, suggest, recommend, or otherwise designate to any employer or representative of an employer, that any individual or individuals be employed in any job subject to being filled through the aforesaid referral system. This provision shall in no way prohibit any representative of the defendant Union from, upon unsolicited request, giving this opinion of the abilities of any registrant based solely upon personal knowledge of registrant's work experience and performance.

"3. No officer, business agent, employee, or other representative of the defendant Union shall directly, or

indirectly, through others, recommend, suggest, or otherwise indicate to any employer, or representative of an employer, that any registrant not be requested or employed or, if such registrant has been dispatched to work, that his employment be terminated.

"4. Every registrant shall designate on his card the types or classes of equipment he is qualified to operate and with respect to which he is willing to accept employment. Whenever a work order is received calling for special skills, abilities or designating particular models or specifications of equipment, each registrant, in order of their registration seniority, who has designated the general type or class of equipment on his registration card shall be contacted to determine whether he has

or is able to operate the particular model or specification equipment called for and shall not be passed over in favor of a less senior registrant who may have indicated on his registration card the special skill or particular model or specification equipment. Nothing in this provision shall prohibit the hiring by employers of individuals in Group A of the registration system by name for a production machine or for a mechanic or mechanic welder position, provided that such individual has been registered on the out-of-work list for at least twenty (20) days in the district in which the work is to be performed. Such a request by name must be confirmed in writing on the letterhead of the employer and signed by either the employer or the superintendent of the project.

"5. All registration cards shall be stamped to indicate the date and time received and shall be maintained in a registry in strict chronological sequence.

"6. All dispatching of registrants shall be made during the periods 7:30 a.m. to 12:00 a.m. and 2:00 p.m. to 5:00 p.m., Mondays through Fridays, holidays excepted, and 7:30 to 12:00 a.m. on Saturdays provided, however, when extraordinary circumstances require the dispatching hours may be extended beyond the aforestated time limitations.

"7. One or more telephones shall be designated in each office as dispatch telephones and shall be equipped at all times with an appropriate and adequate telephone recording device which will provide a verifiable means of

recording the sequence of calls made and the digit sequence of dialed calls, the signal and all statements made by the dispatcher to the party called and the party's response and the time and date of the cali. Upon request of the member, the entire conversation shall not be recorded. Such system shali be in place within forty-five (45) days of entry of this order and within thirty (30) days hereof the defendant Union shall advise the Court of the nature and features of the system it proposes to adopt and shall, upon notice to the plaintiff, seek an order permitting implementation of the system. If the Court disapproves of the defendant's proposal, the defendant may, at its option, propose a different system which would be acceptable to the Court or may

withdraw its consent to incorporation of this entire agreement into the Court's final order and the Court deems may thereupon amend its final order as the Court appropriate. If the Court approves a proposal over plaintiff's objections, the plaintiff may withdraw his consent to the incorporation of this entire agreement into the Court's final order and the Court may thereupon amend its final order as the Court deems appropriate. The original tape or other media containing the recordings shall be preserved for a period of ninety (90) days, provided, however, that in the event a dispute arises over whether a dispatch has been properly made or whether a registrant has been denied, or improperly offered a referral opportunity, the tape or other recording media con-

taining the telephone calls relating to the disputed dispatch shall be preserved until the dispute is finally resolved. All registrants shall provide a working telephone number to the Union for purposes of receiving dispatch calls. All dispatch calls shall be made over a recorder equipped telephone, provided, however, that in the event of an excess work load another telephone may be used temporarily to meet workload demands, and a log kept of all calls so made reflecting date, time, number and person called. If a call to a registrant for a referral is made on a telephone not equipped with a recording device and is not completed because the telephone is not answered or the line is busy or the telephone is answered but the registrant is not available, the registrant shall

immediately be recalled over a telephone equipped with the recording device specified herein and the busy signal, failure to answer, or absence of the registrant shall be verified.

"8. If a registrant called for dispatch to a job opportunity cannot be reached because the call is not answered, then the dispatcher shall go on to call the next senior registrant listing the qualification to operate the class of equipment called for in the work order. In the event of a busy signal, the dispatcher is permitted to attempt a recall within ten (10) minutes before bypassing the registrant in favor of another less senior registrant. A registrant who has been called but has not been reached shall retain his seniority in the registry and shall be recontacted in accordance with his re-

ferral seniority, at the beginning of the next dispatching period until such time as he is contacted and is dispatched. After the dispatcher has attempted and failed to reach a registrant three (3) times because the call is not answered or the line is busy, the registrant shall be informed by certified mail that the dispatcher has been unable to reach the registrant, and the registrant will be requested to contact the dispatcher immediately.

"9. When a dispatcher is available, all dispatches shall be made by a dispatcher assigned the responsibility during office hours and no business agent or other representative of the Union shall dispatch registrants. However, in the event that a dispatcher is not available, or the dispatcher seeks

assistance because of the workload, a business agent may dispatch registrants, provided, however, that all dispatches made by a business agent or other representative of the Union shall be made in accordance with the terms of this Agreement, and the identity of the business agent shall be recorded.

"10. All work orders and all requests for or recalls of operating engineers registered for referral shall be directed to and received by dispatchers assigned the responsibility during office hours unless the dispatcher is unavailable or otherwise occupied, in which case the business agent or other representative of the Union shall accept such work offer and process it in accordance with the provisions hereof. The identity of any person receiving the

work order shall be noted on the order.

"11. All work orders shall be promptly stamped and reduced to writing so as to accurately indicate the date and time the work order was received. Work orders shall be filled in accordance with the sequence in which they are received; except that if it becomes necessary, because of the volume of work orders, the dispatcher may defer filling work orders for jobs starting later than the next working day, until work orders for jobs starting the next working day have been filled. The work orders together with the names of registrants dispatched in response thereto shall be retained at the office for a period of not less than one (1) year, provided, however, that should any dispute arise over the correctness or validity of a

dispatch in response to a work order, then the work order or orders involved in the dispute shall be retained until such time as the dispute is finally resolved.

"12. Each Monday, each District Office shall compile and post a legible list of all work referrals made during the previous week containing notations of the name of the registrants and their respective dates and times of registrations, date and time of work order, date of job start, name of employer, job location, type of equipment, recall, request, cdd days or minority. If the Monday is a holiday then the posting shall be made on the next day on which the office is open for business. Each such posting shall be readily accessible and available for inspection and shall remain posted for fourteen (14) days.

Original work orders used in compiling said list shall be preserved for at least one (1) year. A copy of the posting form is attached hereto.

"13. One (1) hour prior to and one (1) hour after each District meeting and Advisory Board meeting, the work registration cards including those filed in the "temporary deck," shall be available to members registered in that District for inspection. Members shall be entitled to inspect all work registration cards but shall not be entitled to handle such cards.

After dispatches have been posted as provided herein, each registrant shall be entitled to copy ten (10) cards of those registrants who have been dispatched to job sites the preceeding week on equipment that the inspecting

member operates and has listed on his work registration card. Such copying may be done during regular office hours but not more than once every fifteen (15) days and shall be requested and responded to in good faith. The copying shall be limited to the registrants' names, registration date, and listed equipment. Copying shall not be permitted of the registrant's home address and/or phone number. Upon request the inspecting registrant shall be entitled to inspect the work orders giving rise to the ten (10) dispatches. Such work orders shall not be copied unless they vary from the posted information.

"14. Any registrant may inquire of officers, business agents, employees and other representatives of the defendant Union as to job opportunities a-

vailable under contracts between Local 18 and employers which are not subject to the referral system, and shall be given complete and accurate information concerning such job opportunities to the extent of the respondent's knowledge.

"15. Only between the hours of 12:00 noon and 2:00 p.m. shall a registrant be entitled to call into the office and inquire as to his relative position in the deck. The dispatcher, upon request, shall also advise the registrant as to the date of his registration, and the date of registration of the most senior registrant in the registry and the date of registration of the registrant whose card is filed immediately prior to the registrant making the inquiry. A dispatcher, upon request, shall also advise a registrant as to the

number of registrants in the temporary deck and the dates of registration appearing on the first and last registration cards in the temporary deck. All such inquiries shall be made and be responded to in a responsible and reasonable manner.

"16. All rules pertaining to the referral system which have not been reduced to writing shall hereafter be reduced to writing and be posted in each District office.

"17. Should this Agreement be found inconsistent with any valid local, state, federal law or regulation, this Agreement shall be null and void to the extent of that inconsistency.

"18. This Agreement is being entered into as a method of expeditiously implementing this Court's in-

junctive order relating to the operation of the exclusive hiring hall system as established in collective bargaining agreements between the Union and various employer associations, and for no other purpose. Accordingly, the parties agree that this Agreement does not constitute an admission of liability by the defendant Union.

"19. The defendant shall develop and retain in its possession a roster of registrants in group A for each District as of the effective date of this Order."

This Court views this Agreement as plaintiff's and defendant Local 18's joint proposal to modify and amend the "Referral Procedures" section of Local 18's original proposed plan.

Parts A and C of Local 18's

original plan remain intact:

"A. Purposes and Principles: The purpose of this Plan is to provide for the continued compliance by Local 18 with the principles of Union democracy, and to facilitate the free and open exchange of knowledge, principles and ideals which promotes the democratic process of the American Labor Movement.

* * * *

"C. Membership Rights and Union Elections: The Court has found that 'Local 18 has complied with the legal minimums required of it regarding membership access to union meetings, mailing lists and publications.' In addition, Local 18 shall undertake the following:

"(1) Local 18 shall publish in the May and October issues of the Buck-

eye Engineer a copy of Title I - Bill of Rights of Member. of Labor Organizations as set forth in the Labor Management Reform Act of 1959.

"(2) Local 18 shall publish a Notice in the Buckeye Engineer advising all members that copies of the International Constitution and Local Union By-Laws are available in the Union office upon request and shall publish prior to each election all provisions of the International Constitution and Local Union By-Laws pertaining to Union elections, the rights of members and candidates for Union office.

"(3) Prior to the nominations and elections the Union shall publish a Notice in the Buckeye Engineer advising all members that the following publications printed by the United

States Government and pertaining to Union elections the rights of candidates and the rights of union members are available upon request:

"(a) Electing Union officers, published U.S. Department of Labor, Labor Management Services Administration, December 1977 Edition.

"(b) Rights and Responsibilities under the LMRDA, published U.S. Department of Labor, Labor Management Services Administration.

"(4) During and for the period of nomination and election, the Union shall set forth in its agenda a specific portion of each general membership meeting and district meeting for all major candidates to speak to the membership and set forth their positions on the relevant issues of the election. Each

candidate shall be allowed five (5) minutes.

"(5) Considering the size of the Union membership, the period of time for candidates to inspect the membership lists containing the names and the last known addresses of all members shall be extended to two eight (8) hour days."

Plaintiff contends that Part C of the proposed plan will not meaningfully further this Court's stated goals and urges this Court to adopt more comprehensive reforms. Examples of the reforms plaintiff seeks are requirements for publishing union office candidates' biographies and campaign platforms in the Buckeye Engineer and for rotating candidates' names on election ballots. In support of his position, plaintiff in his motion to reject defendant's

proposed plan itemized that which are alleged deficiencies in the August 1978 Local 18 elections. Plaintiff contends that the proposed plan should be rejected inasmuch as it fails to remedy the "kinds of abuses" he asserts took place during the August 1978 election.

This Court, however, specifically concluded that it lacked jurisdiction to consider plaintiff's claims pursuant to 29 U.S.C. §481 regarding Local 18's election practices. Findings of Fact and Conclusions of Law ¶105. Nevertheless, this Court recognized that the parties had addressed at length plaintiff's allegations regarding election practices and therefore offered "some guidance" in the area.

With respect to candidates' reasonable requests to mail campaign

literature to union members at candidates' expense, this Court concluded, "Plaintiff has in fact made use of this service and has never been denied the right to have campaign literature mailed." Id. at ¶105.c.2. This Court also noted that, despite conflicting evidence on the subject, Local 18 had not used its membership lists in a discriminatory manner in election campaigns. Id. ¶105.c.3. Lastly, the Court addressed the non discriminatory use of and access to union publications. This Court recognized that the comments and criticism in the Buckeye Engineer directed at plaintiff and his fellow dissidents was often harsh, but concluded, "The Buckeye Engineer does not evidence a consistent concentrated practice of coverage of incumbent offi-

cers, and denigration of dissidents as to cross that fine line which distinguishes proper reporting from re-election campaigning." Id. at 105.c.5. (footnote omitted). Furthermore, this Court had specifically found, "The fact that some editorial judgment is exercised in the management of the newspaper does not establish that The Buckeye Engineer has been used as a political weapon against the dissidents." Id. at ¶96.

It therefore appears that the extensive remedial measures plaintiff proposes as alternatives to the components of Part C of Local 18's proposed plan address areas over which this Court concluded it had no jurisdiction. Consequently, this Court concludes that it is beyond the scope of this action

to implement the comprehensive reforms in the election process and the Buckeye Engineer plaintiff advocates.

In one of his memoranda in opposition to Local 18's original proposed plan, plaintiff succinctly stated that which was a primary concern of this Court in fashioning a meaningful remedy:

> While the assurance of fair referral opportunities is important in and of itself, the linkage between a nondiscriminatory referral system and democratic governance of the Union cannot be overstated.
>
> So long as individual members of the Union fear that their ability to obtain and keep employment is dependent upon their remaining in the good favor of the controlling officers of Local 18, they are unlikely to overtly express any views other than allegiance and loyalty. Indeed, the only way for members to succeed economically at their trade is to demonstrate intangible ways their support of the incumbent administration.
>
> Accordingly, any efforts seeking

> to democratize the channels of communication and procedures of the defendant Union are doomed to failure so long as members perceive that their economic well-being depends upon their not being viewed as dissidents.

This Court concludes that the Referral System Agreement will meaningfully address this primary concern. The agreement provides for fair work referral and a mechanism by which members may determine whether the system is being operated fairly. When implemented in conjunction with the program for dissemination of information set forth in Part C. of the proposed plan, this Court is confident that the members of Local 18 will be afforded a full and fair opportunity to participate in its governing processes without fear of retribution.

In conclusion, this Court incor-

porates by reference and hereby orders Local 18 to immediately and fully implement the following: 1. Part A of its proposed plan, "Purposes and Principles," 2. The Referral System Agreement reached by the parties, and 3. Part C of its proposed plan, "Membership Rights and Union Elections." With respect to the publications itemized in Paragraph 3 of Part C of the Plan, Local 18 shall make available upon request the most recent editions of said publications.

Having fully incorporated by reference and having ordered the implementation of Local 18's proposed plan as amended by the Referral System Agreement, this Court hereby vacates the punitive damage award against Local 18.

Pursuant to the Referral System Agreement among the parties, this

Court views as withdrawn plaintiff's two motions for contempt sanctions.

XI. CONCLUSION

This memorandum opinion and order fully and comprehensively addresses each of the motions pending on the post-judgment docket. At this time, this Court reaffirms its hope that this lawsuit will renew democratic spirit within Local 18 and that each member will enjoy a full and fair opportunity to participate in its governance.

The parties and their counsel are to be commended for having made the effort to achieve a negotiated resolution of their differences concerning the referral system. This Court also recognizes the important role played by Magistrate David S. Perelman during the parties' negotiations.

Manipulation of the work referral system was at the core of this dispute. This Court is confident that, under the Referral System Agreement achieved by the parties, the system will operate smoothly and be administered in a fair manner. That the parties reached an accord on this delicate issue indicates that a spirit of cooperation has gained a foothold in the relationship between Local 18 and its members. And cooperation is certainly more productive and beneficial than conflict.

IT IS SO ORDERED.

_____
Thomas D. Lambros
United States District Judge

DATED: _____

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

Nos. 82-3702 & 82-3747

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

WILLIAM F. MURPHY,
Plaintiff-Appellee, Cross-Appellant,

v.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 18; JOHN POSSEHL; CHARLES RUTHERFORD; JOHN FRANK; FRANK MILLER; and S. A. BLAIR,
Defendants-Appellants, Cross-Appellees.

ON APPEAL from the United States District Court for the Northern District of Ohio.

Decided and Filed September 30, 1985

Before: ENGEL and JONES, Circuit Judges; and SPIEGEL, District Judge.*

ENGEL, Circuit Judge. This case represents the latest and, it might be hoped, the last of extensive litigation dating from

* Honorable S. Arthur Spiegel, United States District Judge for the Southern District of Ohio, sitting by designation.

1973 and involving an intraunion conflict for control of Local 18 of the International Union of Operating Engineers. This litigation, brought by William F. Murphy, was first commenced on December 21, 1973. Murphy's continuing conflict with Local 18 has already been before this court twice. *International Union of Operating Engineers, Local 18* v. *NLRB*, 496 F.2d 1308 (6th Cir. 1974); *NLRB* v. *International Union of Operating Engineers, Local 18*, 555 F.2d 552 (6th Cir. 1977). The closely allied disputes involving dissident union members John, Ervin, William, and Walter Shimman and their supporters have spawned an even greater flow of litigation. The intraunion conflicts within the International Union of Operating Engineers have also been a specific concern of Congress as it considered the adequacy of federal labor law as it affects union democracy. Interim Report, Select Committee on Improper Activities in the Labor or Management Field, S. Rep. No. 1417, 85th Cong., 2d Sess. 371-443 (1958); *see also Nelson* v. *Johnson*, 212 F. Supp. 233, 265 (D. Minn.), *aff'd*, 325 F.2d 646 (8th Cir. 1963). The detailed facts are to be found in the extensive record in this appeal and in nearly two hundred pages of findings of fact and conclusions of law made by United States District Judge Thomas D. Lambros. The district court's opinion is reported at *Murphy* v. *International Union of Operating Engineers, Local 18 et al.*, 99 L.R.R.M. 2074 (N.D. Ohio 1978).

The result of our careful review of this extensive record is to uphold in nearly all respects the judgment entered by Judge Lambros. The departure we take from his conclusions in certain instances reflect, in the main, changes or refinements in the law which have taken place since particular rulings were made. On the whole, however, Judge Lambros has by prodigious and careful work fulfilled a highly difficult task with skill, intelligence and care. We commend him for it.

The International Union of Operating Engineers, Local

18 ("Local 18" or the "Union") and John Frank appeal[1] and William F. Murphy cross-appeals from the judgment entered in the United States District Court for the Northern District of Ohio in this labor dispute. Appeallants contend that the district court erroneously found violations of section 411 of the Labor-Management Reporting and Disclosure Act ("LMRDA") or "Landrum-Griffin Act"), 29 U.S.C. §§ 401-531; 42 U.S.C. § 1985(3); section 301 of the Labor-Management Relations Act, ("LMRA"), 29 U.S.C. § 185; and various pendent state law claims. Murphy argues that the district court should not have vacated its punitive damages award, should have taxed his expert witness fees as costs, and should have found in his favor on one additional count under section 411.

I. THE FACTS

Local 18 is the collective bargaining representative for approximately 16,000 members who operate and maintain heavy equipment in the construction industry in eighty-five counties in Ohio and four counties in Kentucky. Local 18 is directed by a Business Manager, thirteen other elected officers, and its Executive Board. The Executive Board is comprised of the Business Manager and five of the Union's other elected officers as well as three elected members from each of Local 18's six administrative districts. Each of these six districts is under the direction of a District Representative, who is assisted by Business Agents and clerical employees, all of whom serve at the Business Manager's discretion.

---

[1] While the appellants' notice of appeal states that "each and every defendant" named in the suit appeals, the district court entered judgment against only Local 18, John Frank, and John Possehl. The district court later vacated all awards against Possehl because he died before judgment was entered and the court considered the judgment against him personal in nature. Therefore, only Local 18 and Frank are involved in this appeal.

During the period in question here, John Posschl was Local 18's Business Manager, and John Frank was both Vice-President of Local 18 and Business Agent of District One in Cleveland (from 1962 to 1968) and District Two in Toledo (after 1968).

The Union operates an exclusive hiring hall under a variety of collective bargaining agreements to which it is a party. Under the Union's employment referral system, each member who is seeking employment registers in a district's work referral deck. A member may only be registered in one deck at any time. Referrals are then made on the basis of the member's seniority as an operating engineer and the length of time his card has been in the deck.

Murphy was a Local 18 member who was within District One's jurisdiction. The district court found that Murphy had been associated with the "dissident movement" within Local 18 since 1970. In his lawsuit Murphy claimed that the Union discriminated against the dissidents as class in decision-making work referrals, and access to Union publications. He presented evidence that because of his opposition to the leadership, he was intimidated and subjected to violence, deprived of job referrals, denied a full and fair disciplinary hearing before Local 18's membership, unfairly rejected for reinstatement to the membership, and otherwise deprived of his rights as a Local 18 member. Murphy claimed that these actions were the result of a conspiracy among the Local 18 leaders named as defendants in his suit below.

Specifically, Murphy proved that the Union manipulated its work referral system to deny dissidents, including Murphy, employment opportunities. The number of days Murphy was employed through the Union declined from more than 200 days per year before 1970 (when he joined the dissident movement) to less than 100 days per year after 1970. Other

Local 18 members who were not considered dissidents did not suffer equivalent declines in employment.

In addition, the district court found that the Local 18 leadership used verbal and physical harassment to control the dissidents.[2] Murphy alleged and proved that he was twice physically attacked by agents of Local 18's leadership: on June 27, 1970, he was beaten by two District Two Executive Board members (James Grothaus and Kenneth Delaney) after an Executive Board meeting, and on January 23, 1972, he was knocked unconscious by two District Three members (Raymond Eugene Shell and A. J. Roberts) while passing out dissident literature before a statewide Local 18 meeting.

Finally, Murphy established that the Union improperly disciplined him for his alleged theft of an election control list. Murphy was charged with the theft and tried before the District One membership, as required by Local 18's constitution and bylaws. The membership voted to convict him, and he was suspended for two years. In the district court Murphy proved that the District One leadership arranged to have members from other districts attend the meeting at which his disciplinary hearing was held in order to ensure his conviction. Murphy also established that as additional punishment for his conviciton, the District One leadership removed his work referral card from its referral deck and refused to reregister the card, even though the removal was not a punishment which had been imposed at his hearing. Moreover, Murphy showed that after his two-year suspension had ended, the Union refused to reinstate him as a member.

---

[2] Extensive facts relative to the Shimmans who, like Murphy, were dissidents are chronicled in the cases reporting decisions involving the Shimman brothers. *See Internationa Union of Operating Engineers, Local 18, AFL-CIO (C.F. Braun Co.) and Walter Shimman, et al.*, 1973 NLRB Dec. (CCH) ¶ 25,745 (August 27, 1973); *NLRB* v. *International Union of Operating Engineers, Local 18*, 500 F.2d 48 (6th Cir. 1974); *Shimman* v. *Frank*, 625 F.2 80 (6th Cir. 1980); *Shimman* v. *Frank*, 633 F.2d 468 (6th Cir. 1980); *Shimman* v. *International Union of Operating Engineers, Local* 18, 744 F.2d 1226 (6th Cir. 1984).

II. THE ACTION

On December 21, 1973, Murphy filed this action in the United States District Court for the Northern District of Ohio, alleging violations of the LMRDA, 29 U.S.C. §§ 411, 412. During and at the close of the bench trial, Murphy amended his complaint to add claims under 42 U.S.C. §§ 1981 and 1985(3), as well as other sections of the LMRDA (29 U.S.C. §§ 48(c), 501, 523, 529, and 530), 29 U.S.C. § 185, and a number of pendent claims. Named as defendants were Local 18, John Possehl, John Frank, Charles Rutherford (Local 18 President), Frank Miller (a District One officer), and S. A. Blair (a Local 18 officer).

On July 18, 1978, Judge Lambros entered judgment in Murphy's favor against Local 18, Possehl, and Frank under 29 U.S.C. §§ 411, 412, and 529; 29 U.S.C. § 185 (against Local 18 only); and 42 U.S.C. § 1985(3). He also found in Murphy's favor on state law claims of breach of implied contract (against Local 18 only), breach of fiduciary duty (against Possehl only), assault and battery, and conspiracy. Judge Lambros entered judgment on all counts in favor of defendants Rutherford, Miller, and Blair. *Murphy* v. *International Union of Operating Engineers, Local 18, et al.*, 99 L.R.R.M. 2074 (N.D. Ohio 1978) (hereinafter "Dist. Ct. op.").

The court found Local 18, Possehl, and Frank jointly liable for compensatory damages for Murphy's lost wages and benefits (in an amount to be determined) and $10,000 for pain and suffering. It also awarded Murphy punitive damages in the amount of $30,000 against Possehl, $20,000 against Frank, and $150,000 against Local 18. However, because Possehl had died before judgment was entered, the district court vacated the award of all damages against him. The court also granted Murphy injunctive relief, requiring the Union to cease discrimination against him in its work referral system, to allow him to exercise his right to participate in Union activities, and to expunge its records of all entries concerning

his disciplinary hearing and conviction. Moreover, the court ordered measures to make the Union's work referral system operate more fairly.

On October 14, 1982, Judge Lambros issued a Post-Judgment Memorandum Opinion and Order in which he vacated the punitive damage awards against Frank and Local 18. *Murphy* v. *International Union of Operating Engineers, Local 18, et al.*, No. C73-1336, post-judgment memorandum opinion and order (N.D. Ohio October 14, 1982) (hereinafter "Dist. Ct. post-judgment order"). The award against Frank was vacated because he agreed not to seek or hold any Union office for five years. The award against Local 18 was vacated because the Union submitted a plan to make its decision-making and referral processes more democratic. The court then adopted the Union's plan as part of its injunctive relief. In the October 14 order Judge Lambros also awarded Murphy $133,340 in attorneys' fees. However, he refused to tax as costs the fees of two experts whose testimony Murphy offered to prove the amount of his lost wages and discrimination in employment referrals. This appeal and cross-appeal followed.

On appeal, the Union[3] contends that the district court erroneously found the statutory and common law violations in question. The Union also argues that attorneys' fees should not have been awarded and that their amount was excessive. In his cross-appeal, Murphy claims that the district court should not have vacated its award of punitive damages and should have assessed his expert witness fees as costs. Murphy also assert that the district court should have found the Union's refusal to provide the dissidents access to the Union newspaper improper under 29 U.S.C. § 411.

---

[3] In the discussion that follows the term "Union" includes both appellants, namely, Local 18 and John Frank.

III. THE SECTION 411 LANDRUM-GRIFFIN ACT CLAIMS

Title I of the Labor-Management Reporting and Disclosure Act (also known as the Landrum-Griffin Act), 29 U.S.C. §§ 411-15, provides a number of protections for union members.[4] The Landrum-Griffin Act was "primarily intended to

---

[4] Section 411 provides:

> **§ 411. Bill of rights; constitution and bylaws of labor organizations**
>
> **(a)(1) Equal rights.**—Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.
>
> **(2) Freedom of speech and assembly.**—Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided*, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.
>
> **(3) Dues, initiation fees, and assessments.**—Except in the case of a federation of national or international labor organizations, the rates of dues and initiation fees payable by members of any labor organization in effect on September 14, 1959 shall not be increased, and no general or special assessment shall be levied upon such members, except—
>
> (A) in the case of a local labor organization, (i) by majority vote by secret ballot of the members in good standing voting at a general or special membership meeting, after reasonable notice of the intention to vote upon such question, or (ii) by majority vote of the members in good standing voting in a membership referendum conducted by secret ballot: or
>
> (B) in the case of a labor organization, other than a local labor organization or a federation of national or

correct the abuses which have crept into the labor and management field . . ." H.R. Rep. No. 741, 86th Cong., 1st Sess., *reprinted in* 1959 U.S. Code Cong. & Ad. News 2424. Congress found that "it is essential that union practices and

---

international labor organizations, (i) by majority vote of the delegates voting at a regular convention, or at a special convention of such labor organization held upon not less than thirty days' written notice to the principal office of each local or constituent labor organization entitled to such notice, or (ii) by majority vote of the members in good standing of such labor organization voting in a membership referendum conducted by secret ballot, or (iii) by majority vote of the members of the executive board or similar governing body of such labor organization, pursuant to express authority contained in the constitution and bylaws of such labor organization: *Provided*, That such action on the part of the executive board or similar governing body shall be effective only until the next regular convention of such labor organization.

(4) Protection of the right to sue.—No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding, or the right of any member of a labor organization to appear as a witness in any judicial, administrative, or legislative proceeding, or to petition any legislature or to communicate with any legislator: *Provided*, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof: *And provided further*, That no interested employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any such action, proceeding, appearance, or petition.

(5) Safeguards against improper disciplinary action.—No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

(b) Any provision of the constitution and bylaws of any labor organization which is inconsistent with the provisions of this section shall be of no force or effect.

92 U.S.C. § 411.

procedures be democratic and that they recognize and protect the basic rights of the union members and the employees represented by unions." H.R. Rep. No. 741, *supra,* at 2429. The "Bill of Rights" sections of the Act contained in Title I guarantee members, among other protections, equal rights to vote and otherwise participate in union deliberations, 29 U.S.C. § 411(a)(1), as well as the rights of free speech and assembly, 29 U.S.C. § 411(a)(2). Section 411(a)(5) also protects union members from being "fined, suspended, expelled or otherwise disciplined except for nonpayment of dues" without a full and fair hearing. Section 529 of the Act, 29 U.S.C. § 529, further provides that members may not be disciplined for exercising their rights under the Act. Each of these rights may be enforced in a civil action in a district court. 29 U.S.C. § 412.

A. Manipulation of the Union Referral System

Murphy alleged and Judge Lambros found that the Local 18 leadership had manipulated its job referral system to deny Murphy work. Local 18 is an exclusive hiring hall which makes job assignments through the use of cards in a work referral deck. Ordinarily, members who are qualified for a job and whose cards have been in the deck for the longest period of time are the first offered work assignments when they come into the office. However, Judge Lambros found that the District One leadership had manipulated the employment referral system to benefit their supporters and punish dissidents and that Murphy had experienced a great decrease in his average annual employment because of his dissident activities. Judge Lambros held that even though the Union had improperly discriminated against Murphy in administering its job referral system, those acts did not constitute "discipline" under either section 411(a)(5) or section 529. He did, however, characterize the acts as "economic discrimination" violative of Murphy's equal rights and right to free

speech protected under sections 411(a)(1) and (2). The Union claims that under *Finnegan* v. *Leu*, 456 U.S. 431 (1982), the claimed conduct is not actionable under section 411.

Under section 411(a)(5) and section 529 of the Landrum-Griffin Act, a union may not discipline a member without observing certain procedural due process safeguards, including providing a full and fair hearing. 29 U.S.C. § 411(a)(5); 29 U.S.C. § 529. Before the Supreme Court decided *Finnegan* v. *Leu*, the Second Circuit had held that the term "discipline," as used in the Act, "must include something more than the usual forms of union discipline – fines, suspension, or expulsions – which are expressly mentioned [in the Act. The term] extends as far as 'blacklisting' or certain other union actions that interfere with a worker's employment opportunities." *Morrissey* v. *National Maritime Union of America*, 544 F.2d 19, 26 (2d Cir. 1976). In *Detroy* v. *American Guild of Variety Artists*, 286 F.2d 75 (2d Cir.), *cert. denied*, 366 U.S. 929 (1961), the Second Circuit held that the union's listing of a member on an "Unfair List," which "virtually barred [plaintiff] from employment by those dealing regularly with the [union]," constituted discipline within the meaning of section 411(a)(5). *Id.* at 79-81.

In *Figueroa* v. *National Maritime Union of America*, 342 F.2d 400, 406 (2d Cir. 1965), the Second Circuit, while reaffirming *Detroy*, held that no "discipline" took place where the union's refusal to refer members to jobs was obedient to the employers' wishes as embodied in a collective bargaining agreement. There the court found that

> the refusal to register and refer was pursuant to the terms of a collective bargaining agreement and in compliance with the declared policy of the shipowners that they will hire no seaman known to have a narcotics conviction. This was no more "discipline," once appellees admitted their convictions and the applicability to them of the terms of the collective bargaining agreement, than it would have been to turn down an applicant

> who admitted that he lacked a physical requirement for the job or who admitted that he fell outside the age limits specified by the employer.

Id. Thus, the court concluded that because such acts did not constitute "discipline," the plaintiffs' section 411(a)(5) rights were not violated when they were denied a hearing. *Id.*

Plainly, it cannot be argued the Union's discrimination against Murphy was pursuant to employers' wishes embodied in a collective bargaining agreement. *Figueroa* is, therefore, not on point and the facts here are more akin to those in *Detroy*. Thus, if we follow the Second Circuit, the Union's actions in manipulating the referral system to deny Murphy work can be considered "discipline" for which Murphy should at least have first received a hearing.[5]

---

[5] The Union asserts that *Finnegan* v. *Leu* may have implicitly overruled *Detroy*. In *Finnegan* v. *Leu*, the Supreme Court held that discharge from appointive union employment is not "discipline" within the meaning of section 529 or section 411(a)(5). 456 U.S. at 438-39. The Court concluded that "the term 'discipline' . . . refers only to retaliatory actions that affect a union member's rights or status *as a member* of the union. [The term was] meant to refer only to punitive actions diminishing membership rights." *Id.* at 437-38 (emphasis in original). In our view, *Finnegan* is plainly distinguishable because the plaintiff there was an appointed employee of the union itself, and the Court stressed the importance of allowing "an elected union leader to chose a staff whose views are compatible with his own," *id.* at 441 (footnote omitted). This represents a view anticipated by the writer in *Witte* v. *Myers*, 343 F. Supp. 873, 883 (W.D. Mich. 1971).

Two subsequent court of appeals decisions dealing with "benching" apply *Finnegan* to union actions affecting outside employment. *Turner* v. *Local Lodge No. 455, etc.*, 755 F.2d 866 (11th Cir. 1985); *Hackenburg* v. *International Brotherhood of Boilermakers, etc.*, 694 F.2d 1237 (10th Cir. 1982). However, those decisions may be distinguished from the instant case because the unions there acted pursuant to valid collective bargaining agreements and did not intend to suppress any section 411 rights.

Miller v. *Holden*, 535 F.2d 912 (5th Cir. 1976), a pre-*Finnegan* decision by the Fifth Circuit holding that the union's alleged inducement of plaintiff's discharge from employment with a union-affiliated trust did not constitute discipline, is also distinguishable. In *Miller*, the court specifically noted that the employment in question was totally unrelated to union member status: "Our opinion today . . . demonstrates that a discharge from employment represents discipline

In one significant aspect, however, the Second Circuit cases may be distinguished. The employment-related sanctions imposed in those cases totally foreclosed the plaintiffs' employment opportunities while it appears here that the work referral system was manipulated merely to *lessen* Murphy's chances of being referred to a job. Because Judge Lambros also held that the Union's actions in removing Murphy's work card from the work referral deck (and thereby totally foreclosing employment through the Union) did constitute "discipline," this difference seems to have been significant to the district court. Judge Lambros' conclusion that mere unsystematic manipulation, as opposed to a total foreclosure of such job referrals, may not constitute "discipline" thus represents a cautions approach to section 411.

Even though Judge Lambros held that the Union's actions with regard to the referral system were not "discipline," he still found that those actions were redressable under section 412 as a violation of Murphy's section 411(a)(2) right to free speech and section 411(a)(1) equal rights, because the Union was attempting to suppress Murphy's participation in Union activities. Judge Lambros thus correctly recognized that a suit may be brought to redress an infringement of section 411 rights even if no improper "discipline" is shown. *Finnegan* v. *Leu*, 456 U.S. at 439; *Cehaich* v. *Inter. Union, UAW*, 710 F.2d 234, 238 (6th Cir. 1983).

Relying on *Finnegan*, however, the Union argues that the "economic discrimination" alleged by Murphy did not infringe his section 411(a)(1) and (2) rights. In *Finnegan*, the Supreme Court held that a union leader's discharge of a union employee because of the employee's support of a losing can-

---

only when the member's employment status is a function of some internal union status, *such as a hiring hall* or, conversely, a union blacklist." *Id.* at 915 (emphasis added). Here the Union operated an exclusive hiring hall, and *Miller's* holding concerning discipline thus clearly not on point.

didate for union office was at most an "indirect interference" with the exercise of the employee's membership rights. The Court found that this indirect inference with the rights of free speech and free participation in union deliberations did not amount to a violation of section 411(a)(1) or (2). 456 U.S. at 440-42. The Union contends that its acts here are at most such an "indirect interference," not actionable under section 411(a)(1) or (2).

We believe the Union's reading of *Finnegan* is overbroad. In *Finnegan*, the Supreme Court was clearly concerned about a union leader's right to choose people to help him run the union:

> [The Landrum-Griffiin Act] does not restrict the freedom of an elected union leader to choose a staff whose views are compatible with his own. Indeed, neither the language nor the legislative history of the Act suggests that it was intended even to address the issue of union patronage. . . .
>
> . . . Nothing in the Act evinces a Congressional intent to alter the traditional pattern which would permit a union president under these circumstances to appoint agents of his choice to carry out his policies. . . .
>
> . . . Rather, its concerns were with promoting union democracy, and protecting the rights of union *members* from arbitrary action by the union or its officers.

456 U.S. at 441-42 (footnotes omitted) (emphasis in original). *See also Witte* v. *Myers*, 343 F. Supp. 873, 883 (W.D. Mich. 1971), in which this writer held that "[t]he provisions of . . . the LMRDA, U.S.C.A. § 411(a)(5) . . . do not preclude the summary removal of a union member from a union office or employment." The *Finnegan* decision dealt only with union employees involved with decision-making at the union management level; it left open whether the decision applies even to "nonpolicymaking and nonconfidential employees"

of the union itself. 456 U.S. at 441 n.11.[6] Plainly, the Supreme Court in *Finegan* did not intend to rule out section 411 as a protection against manipulative discrimination on behalf of an ordinary union member seeking to exercise his right of expression at union meetings.

Therefore, the Union's argument here must fail. The "economic discrimination" involved in manipulating a work referral system to discriminate against a member because of his exercise of his section 411 rights is, in our view, actionable, and Judge Lambros properly found such a violation here. *See Miller* v. *Holden*, 535 F.2d 912, 915-16 (5th Cir. 1976).

B. Refusal to Reregister Work Card

The Union again relies on *Finnegan* v. *Leu*, 456 U.S. 431 (1982), to argue that Judge Lambros erroneously found that the Union had "disciplined" Murphy without the due process guaranteed by section 411(a)(5) when it removed Murphy's work card from the work referral deck after he was suspended for theft of an election control list. The punishment formally imposed for that theft did not include such removal. The Union contends that the removal was "employment-related" and did not affect Murphy's rights as a union member to engage in union politics, and that Murphy was, therefore, not entitled to the procedural protections of the LMRDA. We disagree.

The Union's action in foreclosing Murphy's participation in the work referral program was a sanction which set him apart from other members in good standing. It unquestionably affected his membership rights. Judge Lambros correctly

---

[6] The special concurrence of Justice Blackmun, with whom Justice Brennan joined, also stressed that the majority opinion in *Finnegan* should not necessarily be read to allow a newly elected union leader to retaliate against all union member-employees who opposed his candidacy. *Finnegan* v. *Leu*, 456 U.S. at 442-43 (Blackmun, J., concurring).

held that the removal of the card was discipline impermissibly imposed without a full and fair hearing.

C. Partiality in the Disciplinary Hearing

Judge Lambros determined that Murphy was denied a full and fair hearing on the charges that he stole the election list. The court found that members of Local 18's other districts had been brought in by the District One leadership to vote against Murphy in the disciplinary proceedings. Such manipulation of the tribunal's composition, Judge Lambros held, totally tainted the proceedings. The Union contends that only the testimony of Kenneth Delaney, a District Two Executive Board member and an admitted perjurer, supports the conclusion that members of other dirtricts were brought in to convict Murphy. The Union further argues that even if Delaney's testimony proves that he at least had been told to attend the meeting and vote against Murphy, section 411(a)(5) was not violated.

29 U.S.C. § 411(a)(5) provides that a union member may not be disciplined by the union unless he has been "afforded a full and fair hearing." The Sixth Circuit has construed "this to mean that traditional concepts of due process should apply" to union disciplinary hearings, including the right to an impartial tribunal. *Kuebler* v. *Cleveland Lithographers & Photo. U. Loc. 24-P*, 473 F.2d 359, 364 (6th Cir. 1973). A number of other courts have also held that under section 411(a)(5), "an unbiased tribunal is a fundamental requisite to a fair hearing." *Stein* v. *Mutuel Clerks' Guild of Mass., Inc.* 560 F.2d 486, 491 (1st Cir. 1977); *see also Goodman* v. *Laborers' Intern. Union of North America*, 742 F.2d 780, 784 (3d Cir. 1984); *Myers* v. *Affiliated Property Craftsmen, etc.*, 667 F.2d 817, 820 (9th Cir. 1982). Indeed, the Ninth Circuit wrote in *Myers*, 667 F.2d at 820, that "[w]hen a member of a trial committee has admitted to prejudging the guilt of the accused before the hearing, the courts have not hesitated to

rule there was no full and fair hearing as required by the L.M.R.D.A."

Yet, most of these decisions have concerned disciplinary hearings conducted before a trial committee of limited size. Here Murphy's trial was held before the Union membership as a whole.

There is nothing in the Landrum-Griffin Act to indicate that such a trial before the entire membership is, by itself, inappropriate or violative of the Act. The Act requires only a full and fair hearing, the exact nature of which, we believe, is bound to be affected in a most practical way by the very nature of the body before which that hearing is held. We readily recognize that the members, who are the decision-makers in such cases, will very probably be personally familiar with at least the parties and possibly the facts of the occurrence in question. These "jurors" will enter the tribunal with their prejudices and preconceived ideas of guilt and innocence. In a trial before the union membership as a body, such individual biases of some members do not taint the entire proceeding.

In *Curtis* v. *International Alliance of Theatrical Stage Employees*, 687 F.2d 1024 (7th Cir. 1982), the plaintiff contended that he was denied a fair disciplinary hearing because one executive committee member, who was biased against him, was allowed to vote on his guilt as a member of the jury at the disciplinary hearing and then to vote on his punishment as a member of the executive committee. *Id.* at 1030. The Seventh Circuit rejected Curtis' contentions. The court found that the actions of McLachlan, the allegedly biased executive committee member, "did not affect the decision on Curtis's guilt or innocence [or] otherwise compromise [his] fair hearing. [A]ny influence McLachlan may have had was well-diluted." *Id.* at 1031. The Seventh Circuit concluded that "[t]he conviction by a vote of the entire membership does not invoke [the] concerns [of the Landrum-Griffiin Act] simply because several members voting may have had pre-

conceived notions of the plaintiff's guilt or innocence before hearing the full evidence." *Id.* at 1030-31. We fully agree.

However, in this case Murphy did not claim just that a few possibly biased jurors voted at his disciplinary hearing. Rather, Murphy claimed that Judge Lambros found that the Union leadership intentionally manipulated the voting to obtain Murphy's conviction. In contrast, the Seventh Circuit expressly noted in *Curtis* that Curtis did "not contend that McLachlan attempted to influence other members during the balloting." *Id.* at 1030. Here the Union's deliberate attempt to change the composition of the tribunal and thus "to stack the deck," *Myers*, 667 F.2d at 821, against Murphy distinguishes this case from *Curtis*. We cannot escape the conclusion that the Union's actions here tainted the entire proceeding and violated Murphy's section 411(a)(5) rights.

D. Reinstatement Refusal

The district court found that the Union also violated Murphy's section 411(a)(5) rights by rejecting his petition for reinstatement to union membership. Ostensibly as punishment for his conviction for the theft of the election control list, Murphy was suspended from membership in Local 18 for a period of two years. On March 30, 1974, just before the two-year period expired, Murphy requested the forms which must be submitted by a member desiring reinstatement. No forms were sent, and on April 6, 1974, Local 18's Executive Board voted to refuse Murphy reinstatement because he then had four legal actions pending against the Union. On April 11, 1974, Possehl wrote a letter to Murphy telling him to appear in person at the District One office to obtain the necessary forms. Murphy did not do so. Judge Lambros concluded that the Union's actions were tantamount to an expulsion of Murphy from the Union and that this discipline, imposed without any procedural safeguards, violated Murphy's rights under 29 U.S.C. § 411(a)(5) and 29 U.S.C. § 529.

In its appeal, the Union claims that because Murphy never responded to Possehl's letter requiring him to pick up the reinstatement forms in person, Murphy was not reinstated due to his own inaction.

The Union's argument did not convince Judge Lambros, nor does it convince us. Possehl's letter to Murphy was sent only five days after the Executive Board had voted to refuse any reinstatement. Murphy's contention that Possehl's letter was not a sincere attempt to assist him in obtaining reinstatement seems well-grounded. Judge Lambros correctly found that despite Possehl's letter the Executive Board's action effectively expelled Murphy from the Union without due process and violated section 411(a)(5) and section 529.

E. Intimidation and Physical Violence

The district court concluded that the Union violated Murphy's section 411(a)(1) and (2) rights by preventing him through intimidation and physical violence from participating in intraunion political activities. Judge Lambros found that the Local 18 leadership had threatened and attacked the District One dissidents, including Murphy, in an effort to compel them to stop their dissident activities. Murphy presented testimony to show that he was assaulted twice: first by two District Two Executive Board members at a hotel after an Executive Board meeting and then by two District Three members before a union meeting.

The Union contends that Judge Lambros' finding of a section 411 violation based on these occurrences was erroneous on several grounds: first, any intimidating speech was constitutionally protected; second, Murphy was not intimidated by any of the Union's actions; and, finally, the Union did not authorize or ratify the attacks against Murphy.

The district court based its finding of intimidation in large part on the physical attacks on Murphy and other dissidents and not on any speech, constitutionally protected or otherwise. Judge Lambros wrote that Murphy had not

> proven that he was denied his right to speak at union meetings. However the violence inflicted upon plaintiff has certainly precluded his attendance at certain meetings. Further, said violence considered in conjunction with the economic discrimination suffered by plaintiff clearly serves as an intimidating factor in plaintiff's participation in union meetings.

Dist. Ct. op., 99 L.R.R.M. at 2114 n.325. Judge Lambros' findings are fully adequate. It is absurd to require that a union *succeed* in an attempt to intimidate dissidents before a section 411 violation is established. Finally, the district court found sufficient evidence that Murphy's attackers were acting on behalf of the union leadership and were attempting to suppress Murphy's participation in union activities. This evidence of intimidation and physical violence fully supported Judge Lambros' finding that Murphy's section 411 rights had been violated.

F. Conclusion

Although the district court found that appellants had violated Murphy's rights under 42 U.S.C. § 1985(3), 29 U.S.C. § 185, and several common law theories as well as the Landrum-Griffin Act, the court awarded Murphy only one total amount as money damages:

> The Court has given long and careful consideration to the damages which are to be awarded in this case. Damages may not simply be awarded separately with respect to each offense for which defendants have been found liable, and then tallied to arrive at a final figure. Rather, damages must be reflective of the injuries plaintiff has suffered as a result of defendants [sic] overall effort to suppress plaintiff as a dissident, which effort includes the offenses tried in this lawsuit.

Dist. Ct. op., 99 L.R.R.M. at 2133. The award was to compensate Murphy for "pain and suffering, humiliation, emo-

tional distress, mental anguish and loss of the right to participate in union activities for the period of two years" in the amount of $10,000, and for lost wages in an undetermined amount. *Id.* Upon the proofs the award was entirely reasonable and supported by the findings. We need not, therefore, address the additional arguments raised by the Union to the contrary.

Two issues remain: the award of attorneys' fees and whether evidence on the allegedly invalid section 1985(3) cause of action prejudiced the Union's other claims.

IV. ATTORNEYS' FEES

In his post-judgment order Judge Lambros awarded Murphy $133,340 in attorneys' fees under a "bad faith" theory, a "common benefit" theory, and 42 U.S.C. § 1988.[7] Relying on the Sixth Circuit's en banc decision in *Shimman* v. *International Union of Operating Engineers, Local 18,* 744 F.2d 1226 (6th Cir. 1984), *cert. denied,* 105 S. Ct. 1191 (1985), the Union contends that the attorneys' fee award must be overturned. The Union also argues that the award allowed was excessive.

In *Shimman* v. *International Union of Operating Engineers, Local 18,* 744 F.2d 1226 (6th Cir. 1984) (en banc), *cert. denied,* 105 S. Ct. 1191 (1985), the Sixth Circuit reversed the district court's award of attorneys' fees finding neither "the bad faith" nor the "common benefit" theories applicable. The Shimman brothers were District Two dissidents one of whom, like Murphy, brought a successful LMRDA suit against Local 18. *See Shimman* v. *Frank,* 625 F.2d 80 (6th Cir. 1980). In an en banc decision authored by Judge Kennedy, the Sixth Circuit disallowed the district court's award of attorneys' fees in that case. 744 F.2d at 1238.

---

[7] Because we conclude that Murphy's section 1985(3) cause of action must fail, *see infra* at 24, the attorneys' fee award here must be upheld, if at all, on one of the common law grounds and not under section 1988.

Judge Kennedy stated that there are three categories of bad faith considered by courts in construing the "bad faith" exception to the American Rule that "a prevailing party may not ordinarily recover attorneys fees," *id.* at 1229: "(1) bad faith occurring during the course of the litigation; (2) bad faith in bringing an action or in causing an action to be brought; and (3) bad faith in the acts giving rise to the substantive claim." *Id.* at 1230 (footnote omitted). After deciding that only the third category of bad faith existed in the *Shimman* case, *id.*, Judge Kennedy concluded that "[t]o allow an award of attorney fees based on bad faith in the act underlying the substantive claim would not be consistent with the rationale behind the American Rule regarding attorney fees." *Id.* at 1231. She, therefore, held "that the bad faith exception to the American Rule does not allow an award of attorney fees based only on bad faith in the conduct giving rise to the underlying claim." *Id.* at 1233.

Here only bad faith inherent in the Union's conduct toward Murphy is at issue. No bad faith in the handling or defense of this litigation is alleged. Therefore, under *Shimman*, Murphy cannot recover attorneys' fees on a "bad faith" theory. Nonetheless, Murphy has demonstrated fully his entitlement to recovery of attorneys' fees on a "common benefit" theory.

Hall v. *Cole*, 412 U.S. 1 (1973), established the general principle that a plaintiff may be awarded attorneys' fees if in bringing his suit, he "'necessarily rendered a substantial service to his union as an institution and to all of its members . . . [by] dispel[ling] the "chill" cast upon the rights of others.'" *Shimman*, 744 F.2d at 1234 (*quoting Hall* v. *Cole*, 412 U.S. at 8). In *Shimman*, Judge Kennedy held that John Shimman could not recover attorneys' fees under the "common benefit" theory, holding that while Shimman's suit could have been of some benefit to the union members in democratizing the union, that benefit was not a direct one; rather, it was one of "general deterrence." 744 F.2d at 1234-36 & n.13. Holding that this "incidental benefit . . . will not justify a fee award,"

Judge Kennedy found the "common benefit" theory inapplicable to Shimman's case. *Id.* at 1235-36.

The distinctions between *Shimman* and the instant case are significant. First, no injunctive relief was ordered in Shimman's case. *Id.* at 1235 n.13. Here Judge Lambros ordered injunctive relief relating to the handling of and access to the Union's work referral system and, in his post-judgment order, adopted a plan containing other significant remedial measures to be undertaken by the Union. That post-judgment plan was submitted by the Union in order to have the punitive damage award against it vacated. This is a second difference between *Shimman* and this case: because the Union submitted the post-judgment remedial plan here, the $150,000 punitive damage award was vacated. If the Union had not adopted these remedial measures of general benefit to Union members, Murphy alone would have received $150,000. In *Shimman*, Shimman received $145,000 in punitive damages, an amount greater than the attorneys' fees he requested. *Id.* at 1235. Judge Kennedy found that other union members would not benefit from the $145,000 award and that Shimman could pay his attorneys' fees out of that award. *Id.* Therefore, Shimman was left no worse off than other union members even though he prosecuted the action. Here, on the other hand, without the award of attorneys' fees, Murphy will receive *no* punitive damages and only $10,000 and lost wages in compensatory damages. Thus, without the attorneys' fee award, Murphy would suffer significant financial loss for litigating a suit that resulted in substantial benefit to the Union as a whole.

On these two bases, we believe that the attorneys' fee award in Murphy's favor is fully justified upon a "common benefit" theory.

The Union also contends that the amount of attorneys' fees awarded was excessive because the district court failed to take into account the relative lack of success Murphy allegedly achieved in prosecuting this case. Specifically, the Union

argues that the court erred in failing to consider the "results obtained" factor developed for fee determinations by the Fifth Circuit in *Johnson* v. *Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974), and allegedly adopted by the Supreme Court in *Hensley* v. *Eckerhart*, 461 U.S. 424 (1983). We do not read *Hensley* as mandating the mechanical "checklist" approach of *Johnson*, although its use might be helpful.

While the Supreme Court did discuss *Johnson* favorably in *Hensley*, the Court noted that

> The district court also may consider other factors identified in *Johnson* v. *Georgia Highway Express, Inc.*, 488 F.2d 714, 717-719 (CA5 1974), though it should note that many of these factors usually are subsumed within the initial calculation of hours reasonably expended at a reasonable hourly rate. See *Copeland* v. *Marshall*, 205 U.S. App. D. C. 390, 400, 641 F.2d 880, 890 (1980) (en banc).

461 U.S. at 434 n.9. Thus, the *Hensley* decision did not approve a checklist approach or disapprove the approach of the Sixth Circuit in *Northcross* v. *Board of Education of Memphis City Schools*, 611 F.2d 624 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980). *See also United Slate, Tile & Composition* v. *G & M Roofing*, 732 F.2d 495, 503 n.5 (6th Cir. 1984).

In *Northcross*, the Sixth Circuit expressly rejected this checklist approach to fee determinations. Instead, the Sixth Circuit held that a district court need only consider the hours of service provided (and whether those hours were reasonable under the circumstances) and a reasonable rate of compensation. 611 F.2d at 636-39. The Sixth Circuit found that such an approach "will take into account all the relevant factors, and will lead to a reasonable result." *Id.* at 642.

In short, we find nothing in *Hensley* or in *Northcross* to warrant disturbing the district judge's award of attorneys' fees or the amount thereof. It appears clear from the record that Murphy's claims were closely interrelated and arose from one

common core of facts. Also, Murphy received compensatory damages and injunctive relief that signified a substantial victory. It seems that the award of fees and the amount of those fees were justified and that a remand is not necessary.

V. ADMISSION OF DISCRIMINATION EVIDENCE

The Union argues that the trial court improperly allowed Murphy to introduce evidence concerning the allegedly class-based discrimination necessary for a claim under 42 U.S.C. § 1985(3), evidence which, it argues, was irrelevant to the section 1985(3) claim and prejudiced the court's findings on the other claims. The Union especially objects to the evidence concerning incidents outside District One involving the Shimman brothers.

However, as Murphy points out, the evidence relating to the section 1985(3) cause of action was also relevant to other claims raised, particularly the pendent conspiracy claim. Moreover, even if some of this evidence was relatively prejudicial and relevant only to the section 1985(3) cause of action, this was a bench trial. We are confident that Judge Lambros, an experienced trial judge deciding the case without a jury, was able fairly to apply the proof to the appropriate cause of action. *See Ghandi* v. *Police Dept. of City of Detroit*, 747 F.2d 338, 355 (6th Cir. 1984); *Northwestern Nat. Cas.* v. *Global Mov. & Stor. Inc.*, 533 F.2d 320, 324 (6th Cir. 1976). We are fortified in this belief by the relatively conservative approach Judge Lambros took in reaching his decision generally.

VI. MURPHY'S OTHER CLAIMS

Murphy moved and was permitted to amend his complaint to add the section 1985(3) cause of action and claims under other sections of the LMRDA (29 U.S.C. §§ 481(c), 501, 523, 529 and 530) and the Labor-Management Relations Act, 29 U.S.C. § 185, as well as pendent state claims of assault and

battery, breach of contract, and conspiracy. It was not error in the circumstances for the court to have allowed this belated amendment of the complaint. Fed. R. Civ. P. 15. The amendment does not appear to have significantly increased the burden of the defense, and no significant amount of additional evidence, other than that adduced in support of the original section 411 claims, was necessary or introduced. At the same time, we agree with the Union that Murphy's section 1985(3) claim is barred by the en banc decision in *Shimman* v. *International Union of Operating Engineers, Local 18*, 744 F.2d 1226 (6th Cir. 1984), *cert. denied*, 105 S. Ct. 1191 (1985).

The facts in *Shimman* are quite similar to and in many particulars overlap those here. Judge Kennedy found that the conspirators' "racial, or perhaps otherwise class-based, invidiously discriminatory animus," which *Griffin* v. *Breckinridge*, 403 U.S. 88, 102 (1971), held necessary to establish a cause of action under section 1985(3), was missing in the dispute between dissenting union members and the union leadership. 744 F.2d at 1236-37; *see also Brotherhood of Carpenters* v. *Scott*, 463 U.S. 825 (1983). We hold Murphy's claim under section 1985(3) is likewise foreclosed for the same reasons.

The other claims challenged by the Union on appeal also appear to be subject to potential defenses of some significance. Yet, we agree with Murphy's suggestion in his brief on appeal that the judgment of the district court may be affirmed entirely on the basis of 29 U.S.C. §§ 411 and 412. The remaining independent state and federal law grounds added by amendment are essentially cumulative. Their correct resolution is not required since the court's judgment and the relief granted may stand solely upon its findings of liability under 29 U.S.C. §§ 411 and 412. We, therefore, decline to address those issues and base our affirmance upon Murphy's section 411 claims.

VII. CLAIMS RAISED BY MURPHY ON CROSS-APPEAL

Murphy raises three issues on cross-appeal. First, he argues that the district court erroneously found that the Union did not violate section 411 by refusing to give the dissidents equal coverage in and equal access to the Union newsletter, the *Buckeye Engineer*. Second, Murphy claims that the district court should have awarded him expert witness fees as part of his costs, and, third, that Judge Lambros erred in vacating his award of punitive damages against the Union.

A. Buckeye Engineer

In his complaint, Murphy alleged that the Union denied the dissidents access to the Union's channels of membership communication, including the *Buckeye Engineer* (the monthly Union newspaper), in violation of 29 U.S.C. § 411. Judge Lambros analyzed the issue in terms of 29 U.S.C. § 481(c), part of Title IV of the LMRDA, rather than section 411 of that Act. His analysis of the section 481(c) claim was correct.

Section 481(c) prohibits unions from discriminating against or in favor of any candidate for union office with regard to the use of membership lists and the distribution of campaign literature. Under section 481(c), a "bona fide candidate for office" in a union may enforce that section in a district court. Otherwise, remedies under Title IV are "exclusive"; that is, they must be pursued by filing a complaint with the Secretary of Labor after contractual remedies have been exhausted. Only the Secretary may then institute a civil suit against the union. 29 U.S.C. §§ 482-83; *Calhoon* v. *Harvey*, 379 U.S. 134 (1964).

Judge Lambros found that Murphy is not currently a candidate for any specific election and that he is, thus, not challenging the use of union funds to discriminate against him in any specific upcoming election. Murphy apparently does not dispute this finding. Therefore, even though Murphy has

been a candidate in the past and may again be one in the future, Judge Lambros correctly decided that Murphy may not invoke section 481(c) to compel the union to grant him access to the *Buckeye Engineer* at this time. Judge Lambros' opinion to this effect, Dist. Ct. op., 99 L.R.R.M. at 2120-21, was the subject of favorable comment in *Camarata* v. *International Brotherhood of Teamsters*, 478 F. Supp. 321 (D.D.C. 1979), *aff'd without opinion*, 108 L.R.R.M. 2924 (D.C. Cir. 1981). *See also Calhoon* v. *Harvey*, 379 U.S. 134, 140 n.13 (1964).

The question then becomes whether Murphy may obtain redress for the alleged discrimination against dissidents in the *Buckeye Engineer* as a violation of his section 411 rights.

If Murphy's claims concerning the *Buckeye Engineer* relate solely to past elections, his claims are foreclosed by Title IV of the LMRDA. "[T]he exclusivity provision included in § 403 of Title IV [29 U.S.C. § 483] plainly bars Title I [section 411] relief when an individual union member challenges the validity of an election that has already been completed." *Local No. 82, Furniture and Piano Moving, etc.* v. *Crowley*, 104 S. Ct. 2557, 2566 (1984) (footnote omitted).

However, "[t]he exclusivity provision of Title IV may not bar post-election relief for Title I claims or other actions that do not directly challenge the validity of an election already conducted." *Id.* at 2566 n.16.[8] *See also Anson* v. *National*

[8] These statements are not strictly essential to the Supreme Court's holding in the case, since *Crowley* concerned the application of Title IV's exclusivity provision *during* the course of a union election. 104 S. Ct. at 2567. The Court concluded:

> In sum, whether suits alleging violations of Title I of the LMRDA may properly be maintained during the course of a union election depends upon the appropriateness of the remedy required to eliminate the claimed statutory violation. If the remedy sought is invalidation of the election already being conducted with court supervision of a new election, then union members must utilize the remedies provided by Title IV. For less intrusive remedies sought during an election, however, a district court retains authority to order appropriate relief under Title I.

Id. at 2571.

Maritime Union of America, 595 F. Supp. 847 (S.D.N.Y. 1984). Here Murphy's complaints with regard to the *Buckeye Engineer* are not predominantly campaign-related. Murphy's First Amended Complaint charged that the Union denied the dissidents "[a]ccess to the channels of membership communication maintained by the . . . Union, including regular and special membership mailings and publications. The individual defendants . . . controlled the contents of special mailings and publications to the membership so as to exclude input by Plaintiff and other dissident members." These allegations deal with continuing unfair coverage of the dissidents rather than simply illicit campaigning for the Union incumbents. In his findings of fact, Judge Lambros found that while "[n]umerous articles . . . appeared in The Buckeye Engineer in connection with upcoming elections[,] [o]nly one item [could] be construed as referring to the dissident movement." Dist. Ct. op., 99 L.R.R.M. at 2105. That item merely encouraged members to vote, stating " 'We all know of cases in other unions where a small minority was able to win an election just because most of the members figured that there was no need to vote.' " *Id.* It seems, therefore, that Murphy's concerns about the *Buckeye Engineer* do not relate to improper campaigning and that his section 411 remedies are not foreclosed because he failed to pursue any section 481 remedies.

We must still determine whether Murphy has made out a section 411 violation. Murphy relies primarily on Judge Jones' opinion in *Knox County Local* v. *National Rural Letter Carriers' Ass'n.*, 720 F.2d 936 (6th Cir. 1984).

In *Knox*, the Knox County Local tried to place an advertisement in *The National Rural Letter Carrier* to oppose one provision of a collective bargaining agreement negotiated by the national union. *The National Rural Letter Carrier* was the national union magazine financed in part by union funds. Although the magazine accepted other commercial advertisements from both members and outside merchants, the national

union refused to print the Local's ad because "it would create 'internal union strife.'" *Id.* at 937.

Judge Jones held that the national's refusal to publish the ad was a violation of section 411(a)(1) and (2). He wrote that section 412

> grants to the courts latitude in fashioning appropriate relief to open channels of communication among members, to facilitate the kind of informed debate which leads to enlightened self-government, and to promote the development of democracy within the union. The latitude granted to us by Title I clearly does not permit unjustifiable judicial interference with internal union affairs. That latitude, however, no less clearly does permit judicial intervention to protect the rights of union members to free speech and to receive information, without which they would be unable to exercise fully their right to participate in deliberations on union affairs. . . .
>
> . . . Before us then is not the issue of whether the courts should ever interfere with internal union activity, but whether the principles underlying Title I justify our interference to the extent of requiring equal access to the union's national magazine in this case.
>
> . . . While we recognize that the First Amendment in and of itself does not require a private publication to publish any information submitted by an outsider, *see, e.g., Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241, 94 S.Ct. 2831, 41 L.Ed.2d 730 (1974), we are guided by First Amendment principles in determining whether Title I requires the national union to allow Knox County Local members access to its publication.
>
> So guided, we conclude that, in this case, Title I requires the NRLCA to publish the paid advertisement submitted by Knox County Local.

Id. at 939 (footnote omitted). The court determined that the "internal union strife" the national union allegedly feared

did not justify the national's actions because the "strife" would not amount to "immiaent lawless action" or be "unreasonably disruptive." *Id.* at 940. Moreover, Judge Jones found that the national's refusal was a content-based restriction on expression prohibited by the First Amendment as embodied in the Landrum-Griffin Act. *Id.* The court stressed that "[w]hen the [national union] opened its magazine to its members and to 'outside' merchants, it effectively opened the forum to the public. Having done so, [it] cannot unreasonably preclude ads submitted by its members based on their content." *Id.* Finally, Judge Jones rejected the argument that the denial of access was permissible because the Local "has other effective avenues for expressing their views." *Id.*

Murphy contends that as in *Knox*, the Union here has denied the dissidents access to the only feasible channel of communication with other Union members. As in *Knox*, the *Buckeye Engineer* is distributed to all 16,600 Local 18 members and is supported by union funds. Here, however, the similarities end, and we find ourselves agreeing with the Union that other factors justify Judge Lambros' result.

In *Knox*, the Local had made an express request to have a specific ad printed in the magazine at their expense. Here Judge Lambros found that other than evidence concerning a single letter (which was printed by the Union in part), "there has been no evidence adduced that dissidents even requested Possehl [who was the editor] to print any other material in The Buckeye Engineer. It does not appear that the rebels ever sought to have the platforms of the respective political factions presented in The Buckeye Engineer." Dist. Ct. op., 99 L.R.R.M. at 2106. Thus, other than the one letter, part of which was in fact printed, no specific request for any publicity was made.

This failure to request any access demonstrates another difference between *Knox* and the instant case. In *Knox*, the

relief ordered by the court could consist of merely requiring the union to accept the Local's ads. Here the relief sought is much broader; Murphy requests a remand to the district court "for the determination of an appropriate remedy to prevent future discrimination in the access to, and coverage in, the *Buckeye Engineer*." Appellee Murphy's Brief at 41. Judicial supervision of a union newsletter to insure equal treatment of varying points of view would certainly involve a greater degree of judicial intervention in union affairs than just ordering a policy of openness in accepting advertising. This problem cannot be solved by ordering the Union to accept any ads submitted by the dissidents because, unlike the magazine in *Knox*, the *Buckeye Engineer* apparently does not accept any ads. The relief sought by Murphy, therefore, goes beyond that sought and granted in *Knox*. Because of the "general congressional policy to allow unions great latitude in resolving their own internal controversies," *Calhoon* v. *Harvey*, 379 U.S. 134, 140 (1964), we believe Judge Lambros' ruling here is consistent with the admonition in *Knox* that any grant of relief must not result in "unjustified judicial interference with internal union affairs." 720 F.2d at 939. *See also Sheldon* v. *O'Callaghan*, 497 F.2d 1276 (2d Cir.), *cert. denied*, 419 U.S. 1090 (1974), holding that while the LMRDA requires the union to give dissidents some means of reaching union members with their views, those means need not invariably include access to a union newspaper.

Here Judge Lambros found that the dissidents had not made any request to have literature mailed to union members at the dissidents' expense and that Local 18 had not used its membership list discriminatorily. Yet, as part of the arrangement in which he vacated punitive damages against the Union, Judge Lambros ordered the Union to make the membership list available to all candidates for office. We cannot find that Judge Lambros erred in thus tailoring relief to the particular facts before him here.

B. Expert Witness Fees

Murphy's second claim in his appeal is that Judge Lambros erred in refusing to award him expert witness fees as costs. Murphy employed one expert to do a statistical analysis showing that the Union had discriminated against the dissidents with regard to work referrals and another expert to calculate his lost earnings because of that discrimination. Murphy requested an award of these experts' fees as costs under Fed. R. Civ. P. 54(d). Judge Lambros denied the request, finding that under *Henkel* v. *Chicago, etc. Ry.*, 284 U.S. 444 (1932), he had no discretion to award expert witness fees. Here Murphy contends that *Henkel* is "of historical interest only" and that such fees may be awarded.

Rule 54(d) provides that, in general, "costs shall be allowed as of course to the prevailing party unless the court otherwise directs." The term "costs" is not defined in the rule. By statute, however, Congress has established that

> A judge or clerk of any court of the United States may tax as costs the following:
>
> (1) Fees of the clerk and marshal;
>
> (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
>
> (3) Fees and disbursements for printing and witnesses;
>
> (4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
>
> (5) Docket fees under section 1923 of this title;
>
> (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

> A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.

28 U.S.C. § 1920. The fees of experts who are not court-appointed (as here) are not included in section 1920.

In *Henkel* v. *Chicago, etc. Ry.*, 284 U.S. 444 (1932), the Supreme Court held that when an award of expert witness fees is not expressly allowed by statute, it may not be taxed as costs. There the Court reversed the district court's award, holding that federal, not state, law governs the award of costs and that under federal law only the witness fees specified by statute (e.g., mileage and per diem) may be taxed: "additional amounts paid as compensation, or fees, to expert witnesses cannot be allowed or taxed as costs in cases in the federal courts." *Id.* at 446.

Murphy argues that the Supreme Court's ruling in *Henkel* was modified in *Farmer* v. *Arabian American Oil Co.*, 379 U.S. 227 (1964), and some courts have so held. *See Paschall* v. *Kansas City Star Co.*, 695 F.2d 322, 338-39 (8th Cir. 1982), *overruled on reh'g en banc (on other grounds)*, 727 F.2d 692 (8th Cir.), *cert. denied*, 105 S. Ct. 222 (1984); *Roberts* v. *S.S. Kyriakoula D. Lemos*, 651 F.2d 201 (3d Cir. 1981).[9] In *Roberts*, for example, the Eighth Circuit adopted a district court's suggestion that "*Farmer* had qualified *Henkel*. . . . *Farmer* appears to hold that Rule 54(d) authorizes district judges to exercise discretion — albeit 'sparing' — to award costs not specifically enumerated in § 1821. . . . We therefore agree . . . that *Farmer* affords a district court equitable discretion to award expert fees when the expert's testimony is indispensible to determination of the case." 651 F.2d at 206.

Other courts, however, have rejected this analysis. For instance, in *Quy* v. *Air America, Inc.*, 667 F.2d 1059, 1067

---

[9] Without discussing *Henkel* or *Farmer*, the Ninth Circuit has also held that consulting and expert witnesses fees may be taxed as costs. *See Thornberry* v. *Delta Air Lines, Inc.*, 676 F.2d 1240, 1245 (9th Cir. 1982), *vacated on other grounds*, 461 U.S. 952 (1983).

(D.C. Cir. 1981), the D.C. Circuit relied on *Henkel* to hold that expert witness fees may not be recovered as costs. The D.C. Circuit, thus, applied *Henkel* as good law and held that under what it believed was "the prevailing view among the circuits," expert witness fees over and above the statutory allowance may not be recovered. *Id.* at 1066-68. While all other circuits have not discussed the possible conflict between *Henkel* and *Farmer*, most appear to follow *Henkel* as good law even after *Farmer*. *See, e.g., Bosse* v. *Litton Unit Handling Systems, Inc.*, 646 F.2d 689, 695 (1st Cir. 1981); *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263, 309 n.75 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980); *Speciality Equipment & Mach. Corp.* v. *Zell Motor Car Co.*, 193 F.2d 515, 521 (4th Cir. 1952);[10] *Baum* v. *United States*, 432 F.2d 85, 86 (5th Cir. 1970); *State of Ill.* v. *Sangamo Const. Co.*, 657 F.2d 855, 865 (7th Cir. 1981); *Cleverock Energy Corp.* v. *Trepel*, 609 F.2d 1358, 1363 (10th Cir. 1979), *cert. denied*, 446 U.S. 909 (1980); *Kivi* v. *Nationwide Mut. Ins. Co.*, 695 F.2d 1285, 1289 (11th Cir. 1983).

The law in the Sixth Circuit is unclear. In *Johnson* v. *Hubbard*, 698 F.2d 286 (6th Cir.), *cert. denied*, 104 S. Ct. 282 (1983), and *Northcross* v. *Board of Ed. of Memphis City Schools*, 611 F.2d 624 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980), the court at least implied that expert witness fees may be awarded as costs. In *Johnson*, for example, the court stated that "[u]nder 28 U.S.C. § 1920(3), the court may tax as costs the fees paid to certain witnesses, within its discretion. This section has been construed on numerous occasions to encompass only expert testimony in a very restricted number of cases." 698 F.2d at 291 n.5. While this statement was clearly dictum in *Johnson*, it does indicate some approval of taxing expert witness fees as costs.

---

[10] This decision predates *Farmer*. However, it appears that no Fourth Circuit opinion discussing this question after *Farmer* has been issued.

On the other hand, in *Ott* v. *Speedwriting Publishing Co.*, 518 F.2d 1143, 1149 (6th Cir. 1975), Judge Lively held that "the fees of expert witnesses are not included in the recoverable costs in an antitrust action." Judge Lively's ruling was based on the fact that antitrust plaintiffs may only recover those costs available under Rule 54(d) and 28 U.S.C. § 1920. The opinion at least implies, therefore, that expert witness fees may not be recovered under Rule 54(d) or section 1920.

Thus, the three Sixth Circuit cases appear to conflict. The majority rule in the other circuits, however, seems to be that expert witness fees may not be awarded as costs.

In any event, we note that those courts which allow an award of expert fees restrict recovery to cases in which "the expert's testimony was crucial to the resolution of the case." *Paschall* v. *Kansas City Star Co.*, 695 F.2d at 338. Because it appears unlikely that the testimony of Murphy's experts was "crucial to the resolution of the case," or that Judge Lambros found it so, we uphold his denial of fees.

C. Punitive Damages

Murphy asserts that the court erred in vacating its earlier award of punitive damages against the Union when the Union adopted a plan to open up its election process. Murphy contends that the remedial measures to which the Union agreed were either useless or had already been required by the district court's judgment. He claims, therefore, that the vacation of the punitive damage award allowed the Union to "double dip," that is to use the plan both to comply with the district court's judgment and to avoid the punitive damage award. He argues that the punitive damage award should have been allowed to stand.

Of course, we do not know all of the considerations which went into the district court's final decision to vacate the award of punitive damages. Yet, the decision was quite clearly related to the enlargement of the injunctive relief previously entered by the court. The modified injunctive relief included

provisions for making the Union's decisional and referral processes more democratic.

Certainly, some uncertainty had to have attended the trial judge's determination to award punitive damages in the first place, and the Union has claimed in this appeal that under the original complaint, the trial judge was without authority to award such damages. Indeed, Judge Lambros found that he did not have authority to award punitive damages for violations of section 411. The Union has also argued that the punitive damages were unavailable under section 301 of the LMRA and under 42 U.S.C. § 1985(3). We, of course, ruled earlier that no case was made out under section 1985(3). Also, although we have not reached the issue of whether the district court properly found a section 301 violation, punitive damages may not be awarded under section 301. *Farmer* v. *ARA Services, Inc.*, 660 F.2d 1096, 1106-07 (6th Cir. 1981).

Therefore, it is apparent that any award of punitive damages, in Judge Lambros' view, would have had to depend upon the viability of the pendent state claims. While there is little doubt that under Ohio law punitive damages may be awarded for the state tort of conspiracy when the tort was committed maliciously, *see Columbus Finance, Inc.* v. *Howard*, 42 Ohio St.2d 178, 327 N.E.2d 654, 658 (1975); *Oskamp* v. *Oskamp*, 20 Ohio App. 349, 152 N.E. 208, 210 (1925), Judge Lambros had to be concerned that an award of punitive damages based upon amended claims which were only added during the course of trial might jeopardize the validity of the final judgment upon any appeal. He could have decided that a punitive damage award which was dependent on the belated amendments to the complaint was vulnerable on appeal. The Union could have claimed that the injection of the state causes of action so late in the trial resulted in potential prejudice to them in the tactical decisions which they made in connection with the trial itself.

Whatever may have been his considerations, it is apparent that Judge Lambros converted an uncertainty into a practical

result that he thought was consistent with the equities of the case. We are left, in the end, with evaluating whether the final judgment as modified represents in itself a proper exercise of judicial discretion and not whether the original award was not authorized or did not represent a proper exercise of discretion.

This litigation was both involved and lengthy. The legal issues were difficult and in many instances, as we have pointed out, without any clear answer in existing law. While substantial evidence supports Judge Lambros' determination of bad faith in the Union's conduct, it is apparent from an examination of the entire litigation that it had many facets and that the dissidents, including Murphy, were not invariably free of some fault. In a record so fraught with conflict and credibility determinations, an appellate court should be chary of substituting its judgment for that of a trial judge who obviously spent much time and care in reaching what he conceived to be a fair and legally supportable result. In other words, we conclude that under the circumstances here, it was not an abuse of judicial discretion for Judge Lambros to vacate the award of punitive damages and to broaden the equitable relief awarded. We do not believe we are required to measure the deterrent value of the punitive damages which were vacated against the value of the additional injunctive relief in terms of benefit to Murphy and the Union membership. This was a difficult decision, and we will not disturb it.

AFFIRMED.

STATUTES INVOLVED

29 U.S.C. § 411

§ 411. Bill of rights; constitution and bylaws of labor organizations

(a)(1) Equal rights.—Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.

(2) Freedom of speech and assembly. ——Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: Provided, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

* * * * *

(5) Safeguards against improper disciplinary action

No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges, (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

29 U.S.C. § 412

§ 412. Civil action for infringement of rights, jurisdiction

Any person whose rights secured by the provisions of this subchapter have been infringed by any violation of this subchapter may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located.

42 U.S.C. § 1988

§ 1988. Proceedings in vindication of civil rights, attorney's fees

The jurisdiction in civil and criminal matters conferred on the district

courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

EXCERPT FROM SUPPLEMENTAL BRIEF OF PLAINTIFF-APPELLEE/CROSS-APPELLANT, P. 14

* * * * *

* * * Local 18 before vacating the punitive damage award, and not have "double-counted" the expanded referral system reform independently developed in a separate contempt proceeding, the measures included in Defendants' "Plan", such as allowing candidates for office to address the membership—are not without benefit to the membership.

In short, they got their moneys worth in shouldering Plaintiff's counsel fees.

This Court in *Shimman* declined to award additional counsel fees for the appeal not only because the plaintiff there produced no such equitable relief, but also because he had already won a large punitive damage award from which such fees might be paid. In the instant proceeding Defendants seek to escape from having to pay either punitive damages or counsel fees, and unfairly shift the burden entirely to Plaintiff Murphy to pay his attorneys out of the $10,000 compensatory damage award and whatever amount of back pay the District Court may allow. Such a result is not contemplated by *Shimman* nor by other decisions which have considered the issue. *See, e.g., Bise v. International Bro. of Electrical Workers,* 618 F.2d 1299, 1306 (9th Cir. 1979); *Rosario v. Amalgamated Ladies' Garment Cutters' Union, Local 18,* 605 F.2d 1229, 1245-46 (2d Cir. 1979); *Emmanuel v. Omaha Carpenters District Council,* 560 F.2d 382, 385 (8th Cir. 1977); *Ross v. International Bro. of Electrical Workers,* 544 F.2d 1022, 1025

(9th Cir. 1976); *McDonald v. Oliver*, 525 F.2d 1217, 1227-28 (5th Cir. 1976).

Respectfully submitted,

/s/ ALAN MILES RUBEN
Alan Miles Ruben
Counsel for William F. Murphy,
Plaintiff-Appellee, Cross-Appellant
Cleveland-Marshall College of Law
Cleveland, Ohio 44115
(216) 687-2310

SUPPLEMENTAL AFFIDAVIT IN SUPPORT OF PLAINTIFF'S REQUEST FOR COUNSEL FEES

Case No. C-73-1336

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION
Post-Hearing Docket
Judge Thomas D. Lambros

WILLIAM F. MURPHY,
Plaintiff,

vs.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 18, 18A, 18B, 18C, and 18RA, *et al.*
Defendants.

SUPPLEMENTARY AFFIDAVIT IN SUPPORT OF PLAINTIFF'S REQUEST FOR COUNSEL FEES

STATE OF OHIO :
: SS
COUNTY OF CUYAHOGA :

Before me, a Notary Public, in and for the County of Cuyahoga, State of Ohio, personally appeared ALAN MILES RUBEN, ESQ., who being duly sworn according to law deposes and says:

1. That the attached Power of Attorney and Legal Services Contract is a true and correct copy of the Power of Attorney and Legal Services Contract entered into by and between Plaintiff William F. Murphy and his attorney, Alan Miles Ruben, Esq.

2. That the terms contained in said Power and Contract have not been altered or amended by the parties and are in full force and effect as of the present date, October 29, 1980.

Further Affiant sayeth naught.

/s/ ALAN MILES RUBEN
Alan Miles Ruben, Esq.

SWORN TO, BEFORE ME and subscribed in my presence this 29th day of October, 1980

/s/ PATRICIA F. KEENAN
Notary Public
Patricia F. Keenan
Notary Public, State of Ohio -
Cuya. Cty.
My Commission Expires
April 22, 1985

SPECIAL POWER OF ATTORNEY

Know all men by these presents, that I, William F. Murphy, the undersigned, of P.O. Box 176, City of Orwell, County of Ashtabula, State of Ohio, hereby make, constitute, and appoint Alan Miles Ruben, Esq. of 11505 Lakeshore Boulevard, Village of Bratenahl, County of Cuyahoga, State of Ohio, and Edward R. Stege of the Legal Aid Society of Cleveland, 2108 Payne Avenue, City of Cleveland, County of Cuyahoga, State of Ohio, the true and lawful attorneys in fact for me and in my name, place and stead, and for my use and benefit, and they are empowered to act either jointly or with Mr. Ruben's express approval, severally for, and in the name and place of, the undersigned in all matters connected with the following:

To commence and prosecute any suits or actions or other legal proceedings against the International Union of Operating Engineers Local 18 and certain officers and members thereof in Federal District Court under the Labor-Management Reporting and Disclosure Act of 1959 or in such other cognate proceedings as may be appropriate to protect my rights as an employee and a member of a labor organization.

To rescind my suspension from the International Union of Operating Engineers Local 18 and accompanying fine through grievance proceedings and litigation and to recover damages sustained as a result of such suspension.

To appoint any assistant or associate subject to Mr. Ruben's approval, and to delegate such powers and authority herein granted as may be appropriate in the performance of services hereunder;

To maintain a bank account for the deposit of money damages and the remission of aforesaid fine paid by myself.

In no event shall I be personally responsible for attorneys' fees or any other charges costs and expenses which may accrue in the course of litigation or in the performance of any other service hereunder.

All charges, costs and other expenses will be defrayed through subventions from the American Civil Liberties Union and the Legal Aid Society of Cleveland.

All awards in the nature of reimbursement for charges, costs, and expenses shall be distributed to the American Civil Liberties Union and Legal Aid Society of Cleveland in proportion to their respective original contributions therefor.

Attorneys are empowered and directed to seek counsel fees and reimbursements for charges, costs, and expenses

incurred in the courts of litigation or other legal proceedings commenced hereunder.

Attorneys are entitled to retain whatever counsel fees a court or an agency may direct in compensation for their services rendered in my behalf.

Attorneys have made no warranties as to the successful termination of any cause of action hereunder, and all expressions made by attorneys relative thereto are matters of attorney's opinion only.

I grant to my said attorneys in fact full power and authority to do and perform all and every act and thing whatsoever requisite, necessary, and proper to be done in the exercise of any of the rights and powers herein granted, as fully to all intents and purposes as I might or could do if personally present, hereby ratifying and confirming all that my said attorneys in fact, or their associates or assistants shall lawfully do or cause to be done by virtue of this power of attorney and the rights and powers herein granted.

The rights, powers, and authority of said attorneys in fact to exercise any and all of the rights and powers herein granted shall remain in full force and effect until such time as written notice of revocation is given to and received by the said Alan Miles Ruben and Edward R. Stege and is approved by any court or agency having jurisdiction over the litigation or proceedings commenced hereunder.

In witness whereof, I have hereunto set my hand this 19 day of October, 1973.

/s/ WILLIAM F. MURPHY

Signed in the presence of

/s/ ROGER KATZ

/s/ (Illegible)

Case No. C73-1336

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION
Judge Thomas D. Lambros

WILLIAM F. MURPHY,
Plaintiff,

v.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 18, 18A, 18B, 18C AND 18RA, *et al.*,
Defendants.

STATE OF OHIO)
) ss.
COUNTY OF CUYAHOGA)

AFFIDAVIT

Before me, a Notary Public, in and for the State of Ohio, County of Cuyahoga, personally appeared WILLIAM MARTIN GREENE, Esquire, who being duly sworn according to law, deposes and says that:

1. He is a "Senior Partner" and a shareholder of Fink & Greene Co., L.P.A.;

2. That he graduated from the Case Western Reserve University Law School and was admitted to the California Bar in 1971 and the Bar of this Court in 1972;

3. That his regular hourly rates for the years 1973 - 1980 are set forth in the following table:

Hourly Rates

	Office	Litigation	Negotiation and/or Special Services
1973	$50.00	$50.00	$50.00
1974	$50.00	$50.00	$50.00
1975	$75.00	$75.00	$75.00
1976	$75.00	$75.00	$75.00
1977	$75.00	$75.00	$75.00
1978	$100.00	$100.00	$100.00
1979	$100.00	$100.00	$100.00
1980	$100.00	$100.00	$100.00

FURTHER AFFIANT SAYETH NAUGHT.

/s/ WILLIAM MARTIN GREENE
William Martin Greene

SWORN TO BEFORE ME and subscribed in my presence this 20th day of October, 1980.

/s/ KAY L. HOFFMANN
Notary Public
Kay L. Hoffmann
Notary Public, State of Ohio -
Cuya. Cty.
My Commission Expires
Oct. 30, 1984

Case No. C73-1336

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION
Judge Thomas D. Lambros

WILLIAM F. MURPHY,
Plaintiff,

VS.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 18, 18A, 18B, 18C AND 18RA, *et al.*,
Defendants.

STATE OF OHIO :
: SS
COUNTY OF CUYAHOGA :

AFFIDAVIT

Before me, a Notary Public, in and for the State of Ohio, County of Cuyahoga, personally appeared ROBERT P. DUVIN, ESQ., who being duly sworn according to law deposes and says that:

1. He is a senior partner of Duvin, Flinker & Cahn.

2. That he graduated from Indiana University with a J.D. degree in 1961 and from Columbia University with a LL.M. degree in 1963.

3. That he was admitted to the Indiana Bar in 1961 and the Ohio Bar in 1963.

4. That his regular hourly rates for the years 1973 - 1980 are set forth in the following table:

	Hourly Rates		
	Office	Litigation	Negotiations and/or Special Services
1973	$60.00	$70.00	$ 80.00
1974	60.00	70.00	80.00
1975	70.00	80.00	100.00
1976	70.00	80.00	100.00
1977	$80.00-$100.00	$100.00-$120.00	$120.00-$140.00
1978	$80.00-$100.00	$100.00-$120.00	$120.00-$140.00
1979	$100.00-$120.00	$120.00-$150.00	$150.00-$200.00
1980	$100.00-$120.00	$120.00-$150.00	$150.00-$200.00

Further Affiant sayeth naught.

/s/ ROBERT P. DUVIN
Robert P. Duvin, Esq.

SWORN TO, BEFORE ME and subscribed in my presence this 17th day of October, 1980.

/s/ PATRICIA F. KEENAN
Notary Public
Patricia F. Keenan
Notary Public, State of Ohio -
Cuya. Cty.
My Commission Expires
April 22, 1985

CERTIFICATE OF SERVICE

A copy of the foregoing Supplementary Memorandum with Respect to Counsel Fees and Affidavits were served upon William Fadel, Attorney for Defendants, 1468 West 9th Street, Cleveland, Ohio 44113, by mailing the same to his office with first class postage, pre-paid, this 31*st* day of October, 1980.

/s/ ALAN MILES RUBEN

EXCERT FROM REPLY TO DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR COUNSEL FEES, P. 11

* * * * *

Pursuant to that power, Plaintiff has no financial obligation to counsel, but therein counsel are directed to seek an award of counsel fees and costs against the Defendants. Mr. Stege, pursuant to his contract of employment with the Legal Aid Society, is obligated to remit any fee award made to him to the Society. He is also obligated to pay over to the Society and the A.C.L.U., according to their respective contributions, all reimbursement for costs. The same is true for all other Society attorneys who have participated in the conduct of the present proceeding.

The undersigned counsel, however, is under no obligation for the remission of any fee award made to him. He is responsible for seeing to it that certain expenses incurred by the Cleveland State University, Cleveland-Marshall College of Law are reimbursed out of any such award.

Plaintiff contends that he is entitled to the award of counsel fees regardless of the nature of his relationship with his attorneys or his financial obligations to them. Such factors he insists are irrelevant both to the question of entitlement and to the question of amount. He invites the Court's attention to *Regalado v. Johnson,* (N.D. Ill.), 47 U.S.L.W. 2108 (August 22, 1978), wherein counsel fees were awarded under the Civil Rights Attorney's Fees Awards Act to attorneys employed by a legal services corporation despite the fact that the consent order terminating the litigation did not provide for them. He also adds to the citations contained in his original brief the following cases

supporting his position. *Lea v. Cone Mills Corp.*, 438 F.2d 86, 89 (4th Cir. 1971); *Clark v. American Marine Corp.*, 320 F.Supp. 709, 711-712 (E.D. La. 1970).

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests the Court to award counsel fees and costs against the Defendants and to fix a date for

* * * * *

Supreme Court, U.S.
FILED
JAN 27 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1107

In the Supreme Court of the United States
October Term, 1985

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 18, et al.,

Petitioners,

vs.

WILLIAM F. MURPHY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Alan Miles Ruben,
Counsel of Record
c/o Cleveland-Marshall
College of Law
Cleveland State
University
Cleveland, Ohio 44115
(216) 687-2310
Counsel for Respondent
January 27, 1986

COUNTER STATEMENT OF QUESTIONS PRESENTED

1. Whether the Courts below properly determined the amount of attorney fees to which Respondent was entitled under the "Common Benefit" exception to the "American Rule" by reference to the number of hours reasonably expended on the litigation multiplied by a reasonable "prevailing market" hourly rate pursuant to a modified "lodestar" standard because the "results obtained" did not warrant a downward adjustment and Petitioners failed to establish any other basis for a downward adjustment?

2. Whether Petitioners are barred from contesting the calculation of the amount of attorney's fees awarded because they agreed to waive evident iary hearing and consented to the District Court determining the amount of counsel fees on

the basis of the affidavits of hours expended and rates charged by Respondent's counsel and of hourly charges of comparable attorneys in the community for like services?

3. Whether this Court ought to consider a question not presented to or passed upon by the Court of Appeals, overrule its decision in Hall v. Cole and the decision of every other court which has considered the issue and hold that the existence of a fee obligation is a prerequisite to the award of attorneys fees under the "common benefit" equitable doctrine to the "American Rule" in LMRDA proceedings thereby unjustly enriching union members at the expense of Plaintiff's attorney and restricting the future opportunity of union members to vindicate their LMRDA rights?

4. Whether the attorney fee award

subject of requested review is independently supportable under applicable pendent state law and under the "Bad Faith" exception to the "American Rule" on account of Petitioners' outrageous misconduct which gave rise to Respondent's substantive claims?

TABLE OF CONTENTS

QUESTIONS PRESENTED..... i

TABLE OF CONTENTS..... iv

TABLE OF AUTHORITIES..... viii

COUNTER-STATEMENT OF THE CASE..... 1

REASONS FOR DENYING THE WRIT..... 25

I. THE COURT BELOW PROPERLY DETERMINED THE AMOUNT OF ATTORNEY FEES TO WHICH RESPONDENT WAS ENTITLED UNDER THE "COMMON BENEFIT" EXCEPTION TO THE "AMERICAN RULE" BY REFERENCE TO THE NUMBER OF HOURS REASONABLY EXPENDED ON THE LITIGATION MULTIPLIED BY A REASONABLE "PREVAILING MARKET" HOURLY RATE AS REQUIRED BY THE MODIFIED "LODESTAR" STANDARD ADOPTED IN NORTHCROSS v. BOARD OF EDUCATION OF MEMPHIS CITY SCHOOLS BECAUSE THE "RESULTS OBTAINED" DID NOT WARRANT A DOWNWARD ADJUSTMENT AND PETITIONERS FAILED TO ESTABLISH ANY OTHER BASIS FOR A DOWNWARD ADJUSTMENT 25

A. The Modified "Lodestar" Standard Adopted By The Sixth Circuit In Northcross v. Board of Education of Memphis City Schools Is An Appropriate Standard For Determining The Amount Of Attorney Fees To Which Respondent Is Entitled Under The "Common Benefit" Exception To The "American Rule," And Is Fully Consistent With The Standards Established By This Court And Those Applied By Other Circuits Pursuant To Fee Shifting Statutes And The Exercise Of The Courts' Equitable Discretion..... 25

B. Petitioners Are Barred From Contesting The Calculation Of The Amount Of Attorney Fees Awarded By The District Court And Affirmed By The Sixth District Because They Agreed To Waive Evidentiary Hearing, Consented To The District Court Making A Determination Solely On The Basis Of Affidavits Of Hours Expended And Office Rates Charged By Respondent's Counsel And Of Hourly Charges Of Comparable Attorneys In The Community For Like

Services, And Failed To Identify Any Bases For Reducing The Hours So Submitted Or, The Hourly Rates Found Appropriate By The District Court.... 34

C. The Courts Below Properly Found That The Results Obtained By Respondent In Vindicating The "Free Speech" And "Assembly" Rights Of Union Members, In Substantially Democratizing Union Procedures And In Restructuring The Union's Exclusive Hiring Hall System So As To Assure Its Integrity, Conferred A Benefit Upon Union Members Justifying The Counsel Fees Awarded And That No Part Of The Compensation Was Attributable To Unsuccessful Unrelated Claims..... 40

II. THE FACT THAT RESPONDENT HAD NO FEE OBLIGATION TO HIS COUNSEL WHOSE COMPENSATION WAS CONTINGENT UPON COURT AWARDED ATTORNEY FEES DOES NOT AFFECT RESPONDENT'S ENTITLEMENT TO COUNSEL FEES AND REQUIRE THAT RESPONDENT AND HIS COUNSEL BEAR THE EXPENSE OF LITIGATION WHICH HAS CONFERRED A

SIGNIFICANT COMMON BENEFIT UPON THE MEMBERS OF THE UNION..... 51

III. THE AWARD OF ATTORNEYS FEES IN THIS PROCEEDING IS INDEPENDENTLY JUSTIFIED UNDER THE "BAD FAITH" EXCEPTION TO THE AMERICAN RULE AND UNDER STATE LAW BECAUSE THE VIOLATION OF RESPONDENT'S LMRDA RIGHTS WAS THE PRODUCT OF PETITIONERS' OUTRAGEOUSLY MALICIOUS AND OPPRESSIVE CONDUCT.. 57

CONCLUSION..... 60

TABLE OF AUTHORITIES

Cases

Bise v. International Brotherhood of Electrical Workers, 618 F.2d 1299 (9th Cir. 1979)..... 58-59

Bishop v. Furtado, 635 F.2d 915 (1st Cir. 1980)..... 29

Blum v. Stenson, 79 L.Ed.2d 891 (1984)..... 32, 33, 37, 52

City of Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir. 1974).... 37

City of Riverside v. Rivera, 763 F.2d 1580 (9th Cir. 1985), cert. granted, No. 85-224.. 42

Columbus Finance, Inc. v. Howard, 42 Ohio St.2d 178, 327 N.E.2d 328 (1975)..... 59

Copeland v. Marshall, 641 F.2d 880 (D.C. Cir. 1980) (en banc). 29

Fairley v. Patterson, 493 F.2d 598 (5th Cir. 1974)..... 58

Graves v. Barnes, 700 F.2d 220 (5th Cir. 1983)..... 29

Hall v. Cole, 412 U.S. 1 (1973)..... 42, 43-44, 54, 55, 56, 57, 58

Hensley v. Eckerhart, 461 U.S. 424 (1983)..... 27, 32, 47, 48-49, 50

Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974)..... 28, 29, 32

Lindy Brothers Builders Inc. of Philadelphia v. American Radiator & Standard Sanitary Corp., 487 F.2d 161 (3rd Cir. 1973), appeal following remand, 540 F.2d 102 (3rd Cir. 1976)... 27, 29

McQuiston v. Marsh, 707 F.2d 1082 (9th Cir. 1983)..... 58

Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970)..... 43

Monroe v. County Board of Education, 505 F.2d 109 (6th Cir. 1974)..... 28

Northcross v. Board of Education of Memphis City Schools, 611 F.2d 624 (6th Cir. 1979)... 20, 25, 26, 27, 28, 30-31, 32, 33

Pawlak v. Greenawalt, 713 F.2d 972 (3rd Cir. 1983)..... 34

Philadelphia Division, Pennsylvania Telephone Guild v. Pennsylvania Telephone Guild, 573 F.Supp. 314 (E.D. Pa. 1983)..... 33, 55-56

Richardson v. Communication Workers, 530 F.2d 126 (8th Cir.), cert. denied, 429 U.S. 824 (1976).... 58

Riddell v. National Democratic Party, 712 F.2d 165 (5th Cir. 1983)..... 32

Shimman v. Local 18, 744 F.2d 1226 (6th Cir. 1984) (en banc), cert. denied, 105 S.Ct. 1191 (1985)..... 21, 22, 58, 59

Yablonski v. United Mine Workers of America, 466 F.2d 424 (D.C. Cir. 1972)..... 44

Statutes and Rules

29 U.S.C. Section 185..... 4, 6, 9, 10

29 U.S.C. Section 411..... 1, 6, 8, 10, 21, 26, 44

29 U.S.C. Section 412..... 1, 6, 8, 21, 26

29 U.S.C. Section 414..... 4

29 U.S.C. Section 440..... 4

29 U.S.C. Section 481(c)..... 4

29 U.S.C. Section 483..... 4

29 U.S.C. Section 501(a)..... 4

29 U.S.C. Section 523..... 4

29 U.S.C. Section 529..... 4, 6, 10

29 U.S.C. Section 530..... 4

42 U.S.C. Section 1985(3)..... 4, 7, 9, 19, 20, 22

42 U.S.C. Section 1988..... 19, 22, 26, 27, 48

F.R.C.P. No. 15(b)..... 4

Other Authorities

_____, Court Awarded Attorney Fees Report of the Third Circuit Task Force, October 8, 1985, 771 F.2d (No. 2)..... 29, 32

S. Berger, "Court Awarded Attorneys' Fees: What is 'Reasonable'"?, 126 U. Pa. L. Rev. 281 (1977).. 29, 53-54

COUNTER-STATEMENT OF THE CASE

This proceeding was brought by Respondent, William F. Murphy, a member of a reform faction of a corruptly administered labor organization, who was the target of the entrenched union officers' systematic policy of crushing dissent by starving-out, driving-out, and, if necessary, wiping-out opponents.

The Complaint for reinstatement, damages, and injunctive relief was filed on December 21, 1973 under Sections 101 and 102 of the Labor-Management Reporting and Disclosure Act of 1959, (29 U.S.C. Sections 411, 412) (hereinafter "LMRDA"), charging that Local 18 of the International Union of Operating Engineers and five of its officer-business agent employees, John Possehl, (Business Manager); Charles Rutherford, (President); John Frank, (Vice-President); Frank

Miller, (Conductor and currently the Business Manager); and S. A. Blair, (Chairman, Elections Committee), conspired to suppress dissent and perpetuate themselves and other members of their administration in office and power and in pursuit of this objective systematically attempted to:

1. wipe Murphy out of the Union by a planned campaign of violence as a result of which Plaintiff was severely beaten-up on two occasions,

2. starve Murphy out of the Union by covert manipulation of Local 18's exclusive hiring hall system so as to deprive him of job opportunities, and

3. drive Murphy out of the Union by suspending him from membership after a "Kangeroo" trial whose processes were manipulated to convict him

> and to which numbers of out-of-town members were transported under instructions from the officers to vote "guilty."

On May 23, 1975 Murphy moved for a Preliminary Injunction alleging that Defendants had violated his LMRDA rights by refusing to reinstate him to Union membership following the expiration of his two years suspension but, instead, secretly voting at an Executive Board meeting to expel him because he had filed "litigations" against Local 18. On June 5, 1975 the Court below ordered Murphy reinstated as a member in good standing retroactively effective to May 15, 1974, the date on which the period of suspension ended.

After motions to dismiss and for summary judgment had been denied, trial before Judge Thomas D. Lambros sitting

without jury, commenced on February 26, 1976, continued intermittently for twenty-three days and concluded on January 4, 1977.

At the close of the evidence Murphy moved to further amend his Complaint pursuant to F.R.C.P. No. 15(b) to state claims inter alia, under several additional sections of the Labor-Management Reporting and Disclosure Act of 1959, viz., 29 U.S.C. Sections 414, 440, 481(c), 483, 501(a), 523, 529 and 530; the Civil Rights Act; 42 U.S.C. Section 1985(3); Section 301 of the Labor Management Relations Act; 29 U.S.C. Section 185 and six (6) pendent state law claims, viz, assault and battery; breach of contract; tortious interference with union associational rights; breach of fiduciary duty; and conspiracy.

On July 18, 1978 Judge Lambros filed

his Findings of Fact and Conclusions of Law.

In an Opinion remarkable for its thoroughness, comprehensiveness and clarity, the Court below found the evidence established the existence of a conspiracy to suppress the dissident movement and injure Murphy through the perpetration of unlawful acts and violations of his rights under federal and state law. (F.F. 97, 117; pp. A.154-158., A.281-282).

Accordingly, Judge Lambros held that Murphy had been:

1. arbitrarily and discriminatorily fined, suspended and otherwise disciplined in violation of 29 U.S.C. Sections 411(a)(5) and 529, (F.F. 101-E; pp. A.198-199) and his state law contractual rights (F.F. 114A; pp. A.276-277);

2. Secretly expelled and

officially excluded from participation in Union activities for exercising his federally protected rights in violation of 29 U.S.C. Sections 412 and 529 (F.F. 102 C.1.; pp. A.204-205);

3. Subjected to intimidation, physical violence and economic discrimination in retaliation for his status and activities as a member of the dissident political faction of Local 18 in violation of Sections 29 U.S.C. Section 411(a)(1) and (2) (F.F. 102 B.1.; pp. A.199-202);

4. arbitrarily, discriminatorily and officially barred from use of the job referral system and hence prevented from obtaining employment in violation of 29 U.S.C. Sections 411(a)(5) and 529. (F.F. 102 E.1., 2; pp. A.222-224) and 29 U.S.C. Section 185 (F.F. 108; pp. A.249-251);

5. Deprived of his L.M.R.D.A. rights as a

result of a class-based, invidiously discriminatory conspiracy in violation of the Civil Rights Act, 42 U.S.C. Section 1985(3) (F.F. 110. g; pp. A.265);

6. Physically assaulted and beaten at two Union meetings by agents covertly acting at the direction of the Union and Defendants Possehl and Frank in violation of his state law rights (F.F. 113; pp. A.275-276), and

7. Entitled to sue on behalf of the membership to recover for the Union treasury Union funds diverted by Defendant Possehl to defend civil and criminal actions brought by Murphy and other dissidents against tortfeasors secretly acting at Possehl's direction. (F.F. 116; pp. A.280-281).

Judge Lambros accordingly awarded relief as follows:

1. Compensatory damages,

against Defendants Possehl, Frank and the Union, jointly and severally, in an amount to be determined, for Murphy's loss of wages, retirement benefits, and employment opportunities under 29 U.S.C. Sections 411, 412 and against the Union upon pendent State Law claims for breach of the implied contract between a Union and its members.

2. Compensatory damages under 29 U.S.C. Sections 411 and 412, against Defendants Possehl, Frank and the Union, jointly and severally, in the amount of Ten Thousand Dollars ($10,000) for Plaintiff's pain and suffering, humiliation, emotional distress, mental anguish and deprivation of the right to engage in union activities for a period of two years, and upon pendent State Law claims for the tort of assault and battery. The compensation awarded against

the three defendants for humiliation, embarrassment, pain and suffering, mental anguish and emotional distress was also founded upon 42 U.S.C. Section 1985(3).

3. Damages in the amount of Three Thousand Five Hundred Dollars ($3,500) payable to the Treasury of Local 18 against Defendant Possehl.

4. Punitive damages in the amount of Thirty Thousand Dollars ($30,000) against Defendant Possehl; in the amount of Twenty Thousand Dollars ($20,000) against Defendant Frank, and in the amount of One Hundred Fifty Thousand Dollars ($150,000) against Local 18 upon pendent State Law claims for assault and battery and conspiracy and under 42 U.S.C. Section 1985(3). The award against the Union was further based upon 29 U.S.C. Section 185.

5. Injunctive relief under 29 U.S.C.

> Sections 411 and 529, and 29 U.S.C. Section 185, as well as under pendent State Law, permanently enjoining the Union from interfering with Plaintiff's exercise of his Section 411 rights, and discriminating against Plaintiff in the operation of the referral system. To insure against abuse, the Court ordered that the referral cards of registrants and all work orders were to be dated and time-stamped; lists of the work orders received were to be compiled and posted for seven days in each District office not less frequently than every 120 days, and finally, the referral deck was to be made available to members for inspection and copying for a reasonable period of time immediately prior to and following each district meeting.
>
> (pp. A.313-314 and A.374-375).

Taking judicial notice of the death

of Defendant Possehl subsequent to the trial, however, the Court vacated the punitive damages award against him and omitted from its judgment entry the award of Three Thousand Five Hundred Dollars ($3,500) against him.

The punitive damage award against Defendant Frank was made subject to vacation upon Frank agreeing to refrain from holding any office in the Union for a period of five years.

The punitive damage award against Local 18 was made subject to vacation upon the submission of a plan for adoption as an order of the Court which would "ensure that the channels of communication among and to the membership of Local 18 remain open and accessible to all serious candidates for union office" and address in a meaningful fashion the Court's concern with suppression of dissent and

development of democratic union processes. (p. A-311)

All other claims advanced by Murphy were denied, and judgment was entered in favor of Defendants Rutherford, Blair and Miller on all counts.

The Court deferred consideration of Murphy's Motion for Attorneys Fees pending further submission of the parties.

On October 17, 1978, the Defendant Union filed its proposed plan for the enhancement of communication among members and the democratization of its processes, and subsequently moved to vacate the punitive damage award.

On September 3, 1980 a motion was made to vacate the punitive damage award against the Defendant John Frank.

A series of post-judgment conferences were held by Judge Lambros with counsel for the parties concerning the issue of

attorneys fees, the minutes of which were filed on June 23, 1980, September 8, 1980 and October 2, 1980.

Pursuant to agreement reached among counsel at conference with the Court on October 2, 1980, issues of Plaintiff's entitlement to an award of attorney's fees and the amount of such award were left for determination by the Court, without hearing, upon the affidavits of Murphy's counsel itemizing the hours expended in the cause and their hourly charges, and the filing by the parties of the affidavits reflecting hourly charges of attorneys in the Greater Cleveland Area for comparable services.

On September 15, 1981 Plaintiff moved for contempt sanctions against Defendant Local 18 and its then Business Manager Earl A. Erwin for failure to comply with the Court's injunctive order respecting

the time-stamping and posting of work orders and registration cards and the right of the members to inspect and copy certain data from those records.

On November 30, 1981 the Court issued a post-judgment order which, as amended on December 2, 1981, directed Local 18 through its Business Manager Earl A. Erwin to implement fully on or before December 31, 1981, the injunctive relief set forth in the Court's judgment dated July 18, 1978.

On February 1, 1982 Plaintiff again moved for contempt sanctions on the ground that the Defendants had remained recalcitrant and had failed to comply with the Court's post-judgment orders respecting the operation of the referral system.

To resolve the motion for sanctions, the contempt proceedings were referred to

Magistrate David S. Perelman for the purpose of developing, with the participation of counsel, a plan to reform the referral system operation consistent with the objectives of the Court's order.

A proposal respecting the subsequent operations of the referral system was ultimately drafted and submitted to the Court.

On October 14, 1982 Judge Lambros issued a Post-Judgment Memorandum Opinion and Order.

Therein, the Court vacated the punitive damage award against the Union and adopted as part of its injunctive relief the following additional proposals advanced by the Union:

1. Publication in the May and October issues of the Buckeye Engineer of Title I, "the Bill of Rights" of the Labor Management Reporting and Disclos-

ure Act of 1959.

2. Publication of a notice in this newsletter, that copies of the Union's Constitution and By-Laws are available in the Union office on request.

3. Publication in the newsletter prior to each election of all provisions of the Constitution and By-Laws pertaining to such election.

4. Publication in the newsletter prior to each election a notice that two publications of the Department of Labor, "Electing Union Officers" and "Rights and Responsibilities under the LMRDA", are available on request.

5. Allowing each "major candidate" five minutes to speak at a general membership meeting and a district meeting during the period between nominations and election.

6. Allowing each candidate to inspect, but not copy, a list of the names and last

known addresses of all members for up to "two eight (8) hours days".

The Court also incorporated in its injunctive relief the terms of the proposed settlement of Murphy's then pending motion for contempt sanctions against the Union for failing to comply with the Court's remedial order respecting the operation of the referral system, and treated the contempt motion as having been withdrawn.

The terms for reform of the referral system included:

1. An "anti-steering" provision prohibiting agents of the Union from recommending to employers the requesting of designated members for job opportunities.

2. An anti-discrimination clause prohibiting agents of the Union from suggesting to employers not to request a particular member for employment

or to terminate the employment of any member.

3. Standardization of equipment categories for purposes of filling job orders.

4. Date and time-stamping of registration cards, and job orders.

5. The equipping of dispatch telephones with an adequate telephone recording device to provide a verifiable means of recording the sequence of job referral calls made, the time and date of such calls and the conversations.

6. Weekly posting of job orders and the dispatches made pursuant thereto.

7. Allowing members to inspect registration cards before and after Union meetings, and to copy once every 15 days from up to ten (10) registration cards of members who had been dispatched to jobs during the preceding period.

8. Formulation of work referral rules and the posting thereof in such district office. (pp. A.433-453).

After defendant John Frank agreed to refrain from seeking or holding any office in Local 18 for a period of five (5) years, the Court below also granted the Defendants' Motion to Vacate the Award of Punitive Damages against him.

Finally, the Court determined that Murphy was entitled to the award of a reasonable attorneys' fee because (1) Defendants had acted maliciously and in bad faith against him, (2) the vindication of Murphy's rights resulted in a "common benefit" to the Union and its members and (3) Murphy was the prevailing party in a proceeding to enforce the provisions of 42 U.S.C. Section 1985(3) within the meaning of the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. Section 1988. (pp.

A.401-413).

Applying the Sixth Circuit's guidelines in Northcross v. Board of Education of Memphis City Schools, 611 F.2d 624 (6th Cir. 1979) for the calculation of attorneys fees, the Court below awarded counsel fees to Murphy's lead counsel in the amount of $100,232.50 and to co-counsel in the amount of $33,107.50. (pp. A.413-426). The Court also awarded costs against Defendants in the amount of $1,821.46.

Thereafter, Defendants appealed from the District Court's Judgments of July 18, 1978 and October 14, 1982. Murphy cross-appealed the vacation of the punitive damages award against Local 18, and the District Court's refusal to tax his expert witness fees as costs and to order the Union to offer dissidents equal access to the Union's monthly newsletter.

On September 30, 1985 the Sixth Circuit Court of Appeals, speaking through Judge Albert J. Engel, affirmed the District Court's judgments.

The Sixth Circuit determined that although Murphy's Civil Rights claim under 42 U.S.C. Section 1985(3) was barred by its decision in Shimman v. Local 18, 744 F.2d 1226 (6th Cir. 1984) (en banc), cert. denied, 105 S.Ct. 1191 (1985), all of the District Court's findings as to liability of the Defendants and all of the compensation and equitable relief afforded Murphy were properly founded upon the Labor Management Reporting and Disclosure Act, 29 U.S.C. Sections 411, 412 (pp. A.491). Accordingly, the Court found it unnecessary to review the other independent and essentially cumulative state and federal law grounds relied upon by the District Court (p. A.491).

Responding to the Union's challenge, the Court of Appeals noted that the District Court's award of attorneys' fees to Murphy could not be upheld either under the Civil Rights Attorney Fee Act of 1976, 42 U.S.C. Section 1988, since Murphy's claim under 42 U.S.C. Section 1985(3) was barred, or upon the "bad faith" exception to the American Rule since the Union's bad faith was found in its conduct giving rise to the substantive claim and the rule in the Sixth Circuit was that the bad faith had to be manifest in the bringing or conducting of the litigation. (pp. A.486-487) Shimman v. International Union of Operating Engineers, Local 18, 744 F.2d 1226, 1233 (6th Cir. 1984) (en banc), cert. denied, 105 S.Ct. 1191 (1985).

Nonetheless, the Court held that "Murphy had demonstrated fully his entitlement to recovery of attorneys' fees

on a 'common benefit' theory." (A-487)

Rejecting the Union's further contention that the amount of the award was excessive because the District Court failed to take into account the asserted lack of success Murphy allegedly achieved, the Sixth Circuit held "Murphy's claims were closely interrelated and arose from one common core of facts" and that "Murphy received compensatory damages and injunctive relief that signified a substantial victory." (pp. A.489-490) The Court of Appeals further held that the District Court's calculation of attorneys' fees based upon a determination of the number of hours reasonably expended and a reasonable hourly rate of compensation was a proper approach and would subsume and take into account all of the relevant factors identified in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th

Cir. 1974) and other "check-list" decisions. (pp. A.488-490)

The instant Petition For Certiorari was filed by the Union on December 26, 1985.

REASONS FOR DENYING THE WRIT

I. THE COURT BELOW PROPERLY DETERMINED THE AMOUNT OF ATTORNEY FEES TO WHICH RESPONDENT WAS ENTITLED UNDER THE "COMMON BENEFIT" EXCEPTION TO THE "AMERICAN RULE" BY REFERENCE TO THE NUMBER OF HOURS REASONABLY EXPENDED ON THE LITIGATION MULTIPLIED BY A REASONABLE "PREVAILING MARKET" HOURLY RATE AS REQUIRED BY THE MODIFIED "LODESTAR" STANDARD ADOPTED IN NORTHCROSS v. BOARD OF EDUCATION OF MEMPHIS CITY SCHOOLS BECAUSE THE "RESULTS OBTAINED" DID NOT WARRANT A DOWNWARD ADJUSTMENT AND PETITIONERS FAILED TO ESTABLISH ANY OTHER BASIS FOR A DOWNWARD ADJUSTMENT.

A. The Modified "Lodestar" Standard Adopted By The Sixth Circuit In Northcross v. Board Of Education Of Memphis City Schools Is An Appropriate Standard For Determining The Amount Of Attorney Fees To Which Respondent Is Entitled Under The "Common Benefit" Exception To The "American Rule," And Is Fully Consistent With The Standards Established By This Court And Those Applied By Other Circuits Pursuant To Fee Shifting Statutes And The Exercise Of The Courts' Equitable Powers.

The District Court found that Respondent was entitled to reasonable attorney fees pursuant to 29 U.S.C. Section 412, on account of the vindication of rights enumerated in 29 U.S.C. Section 411, on both the "common benefit" and "bad faith" exceptions to the "American Rule." (A-401-408) The District Court also found attorney fees were recoverable under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. Section 1988. (A-410-412). In order to achieve a "uniform approach" to fee determination, the District Court applied the analysis of Northcross v. Board of Education of Memphis City Schools, 611 F.2d 624 (6th Cir. 1979), cert. denied, 447 U.S. 911 (1980) (hereinafter "Northcross").

In Northcross the Sixth Circuit adopted the modified "lodestar" approach popularized by the Third Circuit's

decisions in Lindy Brothers Builders Inc. of Philadelphia v. American Radiator & Standard Sanitary Corp., 487 F.2d 161 (3rd Cir. 1973), appeal following remand, 540 F.2d 102 (3rd Cir. 1976), and required, subject to specified adjustments, an initial calculation of Section 1988 fees, to be based upon the number of hours reasonably expended at a "fair market" hourly rate. As to the latter element, the Court stated that for counsel who do not maintain a private practice "rates customarily charged in the community may be consulted for guidance." (A-420; 611 F.2d at 636-638).

Petitioners assert that the Northcross analysis is contrary to that adopted by every other circuit and to the standard enunciated by this Court in Hensley v. Eckerhart, 461 U.S. 424 (1983) (hereinafter "Hensley") (Petition, pp. 8,

10, 11, 18). They are plainly wrong.

First, Petitioners seem to complain that the Northcross standard, as applied by the Courts below, fails to consider any of the twelve "factors" identified in Johnson v. Georgia Highway Express, 488 F2d 714 (5th Cir. 1974) (hereinafter "Johnson").

The Johnson "checklist" approach was initially relied upon by the Sixth Circuit in Monroe v. County Board of Education, 505 F2d 109 (6th Cir. 1974), but abandoned in Northcross:

> "We have learned through experience, however, that merely providing a check list of factors to consider does not lead to consistent results, or, in many cases, reasonable fees. Many of the factors are overlapping, and there is no guidance as to the relative importance of each factor, or, indeed, how they are to be applied in a given case." 611 F.2d at 642.

Similar criticism had been directed at Johnson by courts and commentators, e.g., Copeland v. Marshall, 641 F2d 880, 890 (D.C. Cir. 1980) (en banc); Bishop v. Furtado, 635 F2d 915, 920 (1st Cir. 1980); Berger, Court Awarded Attorneys' Fees: What is "Reasonable"?, 126 U. Pa. L. Rev. 281, 285-287, 292 (1977).

In consequence, "those circuits that established their fee-setting procedures after Lindy and Johnson, and had an opportunity to study both systems, have chosen Lindy as the better rule." Court Awarded Attorney Fees Report of the Third Circuit Task Force, October 8, 1985, 771 F.2d (No. 2) 14.

Indeed, even the Fifth Circuit moved to the lodestar approach in Graves v. Barnes, 700 F.2d 220 (5th Cir. 1983).

There may be, however, less differences between the Lindy and Johnson

approaches than meets the eye, because many of the Johnson factors are subsumed and considered in the determination of the appropriate number of hours and the hourly rate.

Thus, the Sixth Circuit in Northcross stated:

> "We conclude that an analytical approach, grounded in the number of hours expended on the case, will take into account all the relevant factors, and will lead to a reasonable result. The number of hours of work will automatically reflect the 'time and labor involved,' 'the novelty and difficulty of the question,' and 'preclusion of other employment.' The attorneys normal hourly billing rate will reflect 'the skill requisite to perform the legal service properly,' 'the customary fee,' and the 'experience, reputation and ability of the attorney.' Adjustments upwards may be made to reflect the contingency of the fee, unusual time limitations and the

> 'undesirability' of the case. Thus, applying the approach used in this decision will result in an award reflecting those considerations traditionally looked to in making fee awards, but will also provide a logical, analytical framework which should largely eliminate arbitrary awards based solely on a judge's predispositions or instincts." 611 F.2d at 642-643.

Specifically, the Court noted that the number of hours submitted may be reviewed and reduced, e.g., "for duplication, padding or frivolous claims" or for other reasons provided the hours are identified and the reason for their elimination articulated. 611 F.2d at 636-637.

Further, the determination of the fair market value of services rendered may take into account a differentiation between trial and office rates and whether the services could have been performed by

less expensive personnel. 611 F.2d at 637-638.

The Sixth Circuit is not alone in recognizing that many of the Johnson factors are subsumed within the initial calculation of hours reasonably expended at a fair market rate. This Court in Hensley, 461 U.S. at 434 n.9, pointed out that it is "usual" that such factors are so subsumed. Cf. Riddell v. National Democratic Party, 712 F.2d 165 (5th Cir. 1983) ("lodestar" need not be adjusted when adjustment factors considered in initial lodestar computation). See also, Third Circuit Task Force Report, supra, at 13-14.

The Northcross analysis is fully consistent with this Court's decisions in Hensley and Blum v. Stenson (hereinafter "Blum") 79 L.Ed.2d 891 2d (1984) which adopted the lodestar approach:

> "The initial estimate of a reasonable attorney's fee is properly calculated by multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate. . . . Adjustments to that fee then may be made as necessary in the particular case." Blum 79 L. Ed. 2d at 895-896. Accord: Hensley, 461 U.S. at 433; See Third Circuit Task Force Report at 14-15.

Although cognizant of the difference between calculating a fee under a fee shifting statute, where Congressional intent is controlling, and under the judicially created "common benefit" exception, where equitable considerations govern, the Northcross "lodestar" formulation followed by the District Court was an appropriate method of determining the amount of the award in the instant proceeding. See, e.g., Philadelphia Division, Pennyslvania Telephone Guild v. Pennsylvania Telephone Guild, 573 F.Supp.

314 (E.D.Pa. 1983); Pawlak v. Greenawalt, 713 F.2d 972 (3rd Cir. 1983).

B. Petitioners Are Barred From Contesting The Calculation Of The Amount Of Attorney Fees Awarded By The District Court And Affirmed By The Sixth Circuit Because They Agreed To Waive Evidentiary Hearing, Consented To The District Court Making A Determination Solely On The Basis Of Affidavits Of Hours Expended And Office Rates Charged By Respondent's Counsel And Of Hourly Charges Of Comparable Attorneys In The Community For Like Services, And Failed To Identify Any Bases For Reducing The Hours So Submitted Or, The Hourly Rates Found Appropriate By The District Court.

The Petitioners contend that the District Court's calculation of attorney fees was flawed because no adjustment was made for "any duplicative time between the [Respondent's] attorneys' pre-litigation and non-litigation time," "clear

duplication between the attorneys in office time, as well as trial preparation and trial appearances," for differentials in rates "for office time as opposed to litigation time" and for "failure to submit contemporaneously kept and prepared time records." (Petition, pp. 10, 16).

Respondent concedes that Petitioners are entitled to call for an evidentiary hearing at which all of these matters may be inquired into, documents examined and counsel themselves subjected to cross-examination on their submissions.

However, at conference with the District Court on October 2, 1980 the parties agreed to waive evidentiary hearing on the issue of counsel fees and consented to the Court determining the amount based upon Respondent's counsel's affidavits, (itemizing the services, dates and hours spent on the proceeding and

appending pertinent biographical information and the power of attorney-fee agreement,) and the affidavits of all counsel setting forth hourly rates charged by counsel and other comparable attorneys in the community. (A-414-415). Because the counsel fee determination was to be made in this fashion, no time records or other evidence was offered with respect to the number of hours of service expended in the proceeding.

Surely Petitioners cannot consent to the Court's making a determination on the counsel fee issue without an evidentiary hearing and, in the same breath, claim that no such ajudication was properly made because of a lack of "back-up documentation" which can only be presented, examined and explained at an evidentiary hearing.

As this Court declared in Blum:

"We decline to consider petitioner's further argument that the hours charged by respondents' counsel were unreasonable. As noted above, petitioner failed to submit to the District Court any evidence challenging the accuracy and reasonableness of the hours charged, see Hensley, supra, at ___ 76 L. Ed. 2d 40, 103 S.Ct. 1933, on the facts asserted in the affidavits submitted by respondents' counsel. It therefore waived its right to an evidentiary hearing in the District Court. See City of Detroit v. Grinnell Corp.,495 F.2d 448, 472-73 (2d Cir. 1974) (where facts are disputed, an evidentiary hearing is required before a district court determines a proper attorney's fee award). In view of the trial strategy it choose, petitioner waived its right to challenge in this Court, the District Court's determination that the number of hours billed were reasonable for cases of similar complexity." 79 L. Ed. at 898 n.5.

The instant proceeding is now in its twelfth year. The voluminous docket sheets and time summaries submitted by Respondent's counsel reflect, among other activities, preparation of some 28 motions and 24 memoranda, conduct of 23 days of trial and the submission of requests for several hundred findings of fact and conclusions of law. Although the actual number of hours devoted to the cause was much higher, lead counsel sought compensation for 1,244.5 hours and co-counsel for 482 hours.

The Petitioners failed to identify any hours which were unjustified or duplicative. Nevertheless, the District Court made an independent review and concluded that counsel "neither claimed unjustified hours nor duplicated each other's services." (A-419). Each counsel submitted a "standard billing rate,"

requesting no premium for time spent in litigation. (A-423).

Reviewing affidavits of rates of other counsel practicing in the community, the District Court found that lead counsel's rates "were in accord with the community standards for an attorney of his experience," except for the years 1975 and 1976, for which period the rates submitted were reduced from $85.00 to $80.00. (A-424) The rates for co-counsel were found to be "reasonable for an attorney of his experience during the period of time he was involved in this case." (A-424)

C. The Courts Below Properly Found That The Results Obtained By Respondent In Vindicating The "Free Speech" And "Assembly" Rights Of Union Members, In Substantially Democratizing Union Procedures And In Restructuring The Union's Exclusive Hiring Hall System So As To Assure Its Integrity Conferred A Substantial Benefit Upon Union Members Justifying The Counsel Fees Awarded And That No Part Of Their Compensation Was Attributable To Unsuccessful Unrelated Claims.

The District Court awarded Respondent's lead counsel $100,232.50 and his co-counsel $33,107.50.

Petitioners do not assert that the amounts are excessive in light of the Union's ability to pay. (Indeed, as the District Court noted, Local 18 is a state-wide union labor organization with some 16,000 members (A-10), and at the time of the proceeding reported income of $3 million, a payroll of $1.6 million and assets of $6 million.)

Rather, the thrust of their argument seems to be that the Sixth Circuit did not consider the "extent of success" or "results obtained," (Petition, p. 20), that there was "disproportionality of the attorney fee award as compared to plaintiff's recovery," (Petition, p. 8-9 n.3), and that the fee should have been reduced for hours expended on Respondent's unsuccessful claims (Petition, p. 18-19).

The relief granted Respondent Murphy included reinstatement to Union membership and expungement of the record of his suspension, injunctive relief assuring, inter alia, fair opportunity to work at the trade, compensatory damages in the amount of $10,000 and lost earnings in an amount still to be determined, however, on a "present value" computation, submitted by Respondent pursuant to leave granted in the District Court's Post-Judgment

Memorandum, Opinion and Order of October 14, 1984 (A-383-385), supports an allowance of $118,042 as of December 31, 1983. Furthermore, Murphy was also initially awarded $200,000 in punitive damages which was later remitted in order to achieve democratic reforms.

But, unlike Section 1988 cases such as City of Riverside v. Rivera, 763 F.2d 1500 (9th Cir. 1985) cert. granted, No. 85-224, the reasonableness of the attorney fees awarded is not to be judged by the personal relief Murphy achieved. It is rather to be viewed in light of the substantiality of the benefit conferred upon all the members of the Union. Respondent's success in this litigation corrected and prevented future abuse prejudicial to the rights and interests of the members. Hall v. Cole, 412 U.S. 1, 5 n.7, (1973) (hereinafter "Hall");

Mills v. Electric Auto-Lite Co., 396 U.S. 375, 396 (1970).

In Hall this Court found the reinstatement of union membership of a dissident member expelled for introducing resolutions critical of the administration's undemocratic actions and policies justified the award of attorney fees:

> ". . . there can be no doubt that, by vindicating his own right of free speech guaranteed by Section 101(a)(2) of Title I of the LMRDA, [plaintiff] necessarily rendered a substantial service to his union as an institution and to all of its members. When a union member is disciplined for the exercise of any of the rights protected by Title I, the rights of all members of the union are threatened. And, by vindicating his own right, the successful litigant dispels the 'chill' cast upon the rights of others. Indeed, to the extent that such lawsuits contribute to

> the preservation of union democracy, they frequently prove beneficial 'not only in the immediate impact of the results achieved but in their implications for the future conduct of the union's affairs.' 412, at 8, quoting Yablonski v. United Mine Workers of America, 466 F.2d 424, 431 (1972).

So in the present proceding, Murphy, by vindicating his own Section 411 "free speech," "assembly" and "disciplinary due process" rights, advanced the interest of every Union member. (A-406)

But, he did much more.

He paved the way for recovery of union funds spent by officers in breach of their fiduciary duty. (A-248)

In exchange for vacation of his $20,000 punitive damage award against Defendant John Frank, he rid the Union of a dictatorial and oppressive officer and business agent. (A-382-383)

In exchange for vacation of a

$150,000 punitive damage award against the Union, he introduced a series of democratic reforms in the governance and administrative processes of the Union. (A-2-A3, A-461-A462, A-464)

The period during which election lists may be examined was enlarged. For the first time, candidates for union office are entitled to speak to the membership on behalf of their candidacies. While the court did not see fit to require the Union to abandon its policy of using the Buckeye Engineer as a forum for self-laudation and criticism of dissidents and permit access to this house organ for opposing viewpoints, it did require the publication to be used as a vehicle for educating the members of the Local as to their rights under the LMRDA on a regular semi-annual basis.

Perhaps most important of all, Murphy

put an end to use of the Union's exclusive hiring hall system as an instrument of political oppression. Dispatch telephones are now equipped with recording devices to provide a verifiable means of ascertaining the sequence in which job referral calls are made. Job orders and dispatches made pursuant thereto are posted weekly and registration cards and job orders are date and time-stamped. "Anti-steering" and "anti-discrimination" provisions are in force. (A-429-A457,A-461-A-462).

This relief, as the Sixth Circuit observed, "signified a substantial victory." (A-490)

Further, as the Sixth Circuit pointed out, the claims upon which Murphy did not prevail "were closely interrelated and arose from one common core of facts." (A-489-490) Indeed, all the unsuccessful claims were added to his complaint by

amendment either after the presentation of his case-in-chief or at the conclusion of trial to conform to the evidence. F.R.C.P. 15(b).

Even under the "prevailing party" fee-shifting statutes, where the focus is upon the successful claims rather than the benefit conferred, this Court expressly rejected the "mathematical approach comparing the total number of issues in the case with those actually prevailed upon," as here apparently urged by the Petitioners. See, Hensley, 103 S.Ct. at 1941 n. 11.

Downward fee adjustments may be appropriate only where a plaintiff failed "to prevail on claims that were unrelated to the claims on which he succeeded" because "a plaintiff may present in one lawsuit distinctly different claims for relief that are based facts and legal

theories" so that "counsel's work on one claim will be unrelated to his work on another claim" with the result that "work on an unsuccessful claim cannot be deemed to have been 'expended in pursuit of the ultimate result achieved'." Hensley, 103 S.Ct. at 1940.

The narrowness of the unsuccessful "unrelated claim" exclusion from Section 1988 counsel fee awards is highlighted by Justice Powell's further comment:

> "It may well be that cases involving such unrelated claims are unlikely to arise with great frequency. Many civil rights cases will present only a single claim. In other cases the plaintiff's claims for relief will involve a common core of facts or will be based on related legal theories. Much of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis. Such a lawsuit cannot be

viewed as a series of discrete claims. Instead the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation.

Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation, and indeed in some cases of exceptional success an enhanced award may be justified. In these circumstances the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit. See Davis v. County of Los Angeles, 8 E.P.D. Paragraph 9444, at 5049 (CD Cal. 1974). Litigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee. The result is what matters." Hensley, 103 S.Ct. at 1940.

In the present case, remand of the attorney fee issue to the District Court in order to consider the relationship between the fee award and the result obtained is not justified.

It is clear that the relief requested by Plaintiff and denied by the District Court, including additional political campaign reforms, were all related to the claims upon which he prevailed, grew out of a common nucleus of operative facts and were based upon related legal theories. They were therefore not "distinct in all respects from his successful claims" within the meaning of Hensley.

II. THE FACT THAT RESPONDENT HAD NO FEE OBLIGATION TO HIS COUNSEL WHOSE COMPENSATION WAS CONTINGENT UPON COURT AWARDED ATTORNEY FEES DOES NOT AFFECT RESPONDENT'S ENTITLEMENT TO COUNSEL FEES AND REQUIRE THAT RESPONDENT AND HIS COUNSEL BEAR THE EXPENSE OF LITIGATION WHICH HAS CONFERRED A SIGNIFICANT COMMON BENEFIT UPON THE MEMBERS OF THE UNION.

Respondent's counsel undertook representation in this cause under a power of attorney and contingent fee agreement which provided that Respondent would not be "responsible for attorneys fees or any other . . . expenses" and that all "expenses will be defrayed through subventions from the American Civil Liberties Union and the Legal Aid Society of Cleveland."[1]

---

1. The withdrawal of financial support for this litigation by the Legal Aid Society of Cleveland and the American Civil Liberties Union because of budgetary contraints resulted in the incurring of substantial expenses which Respondent has either paid or for which he is obliged to reimburse his counsel.

Counsel were "empowered and directed to seek counsel fees and reimbursements for . . . expenses" and were "entitled to retain whatever counsel fees a court . . . may direct in compensation for their services rendered in my behalf."

Although recognizing that the absence of a fee obligation does not affect a client's entitlement to an award under fee-shifting statutes, Blum, 79 L. Ed. at 898 (Legal Aid Society of New York entitled to fee based on "prevailing market rate"), Petitioners now argue that such an obligation is essential to an entitlement under the "common benefit" exception, else there can be no "unjust enrichment" of the benefitted class.

This issue was neither presented to nor passed upon by the Court of Appeals.

It is patently without merit.

The enrichment is "unjust" regardless

whether it comes at the expense of a party or his attorney. The attorney does not merely stand in the shoes of the client, nor will his claim necessarily be measured by the contractual obligation of the client.

> "An attorney may agree to take a case on a basis that will not fully compensate the time and effort to be expended because of the expectation that the lawsuit will create or preserve a fund for the benefit of a broader class. To the extent the contract with the client affords the attorney less than the market value of his or her time and effort, the attorney has incurred a loss in the course of conferring benefits upon others. That loss is the measure of the unjust enrichment to the non-client beneficiaries. . . . The common benefit theory, for these purposes, is merely a corollary of the common fund principle; . . . but is grounded upon the same principle of unjust enrichment." Berger, Court Awarded

Attorneys' Fees: What is "Reasonable"? 126 U. of Pa. L. R. 281, 299-300 (1977) (footnotes omitted).

In LMRDA proceedings there is another powerful reason for awarding attorney fees, even in absence of any fee obligation of the plaintiff to his counsel:

> "Not to award counsel fees in cases such as this would be tantamount to repealing the Act itself by frustrating its basic purpose. It is difficult for individual members of labor unions to stand up and fight those who are in charge. The latter have the treasury of the union at their command and the paid union counsel at their beck and call while the member is on his own. . . . . An individual union member could not carry such a heavy financial burden. Without counsel fees the grant of federal jurisdiction is but a gesture for few union members could avail themselves of it." Hall, 412 U.S. at 12, quoting 462 F2d at 780-781.

Counsel for plaintiff in Hall, Mr. Justice Clark pointed out, had undertaken the case "largely on a pro bono publico basis" so that "Cole and his counsel bore the cost of litigation themselves." Cole v. Hall, 462 F2d 777, 778, 780 (2nd Cir. 1972).

As Judge Shapiro aptly explained in Philadelphia Division, Pennsylvania Telephone Guild v. Pennsylvania Telephone Guild, 573 F.Supp. 314 (E.D. Pa. 1983):

> "Plaintiffs are not precluded from recovering a fee award because they will not otherwise be liable to their attorneys or because . . . [an outside organization] has already paid the plaintiffs' counsel the amount billed to them. Defendants misconceive the common benefit theory on which plaintiffs are entitled to an award of fees. . . . [f]ee shifting in this action to vindicate statutory rights bestows a common benefit and it is equitable for the fees and expenses to be paid from

> the common treasury and shared by all of . . . the union members who gained protection for their right to choose or reject alternative constitutional proposals in a fair and democratic manner with provisions for fair dissemination of views." See also, Pawlak v. Greenawalt, 713 F2d 972 (3rd Cir. 1983).

Petitioners are not able to provide either authority or policy to support the proposition that the existence of a fee obligation is an essential precondition to the award of counsel fees to the successful plaintiff under the "common benefit" equitable exception to the "American Rule."

This Court ought not to overrule Hall.

III. THE AWARD OF ATTORNEYS FEES IN THIS PROCEEDING IS INDEPENDENTLY JUSTIFIED UNDER THE "BAD FAITH" EXCEPTION TO THE AMERICAN RULE AND UNDER STATE LAW BECAUSE THE VIOLATION OF RESPONDENT'S LMRDA RIGHTS WAS THE PRODUCT OF PETITIONERS' OUTRAGEOUSLY MALICIOUS AND OPPRESSIVE MISCONDUCT.

The District Court found:

> "These defendants have intentionally, willfully and maliciously moved on all fronts to suppress plaintiff as a member of the dissident faction of Local 18." (A-402)

Relying on this Court's dicta in Hall that a federal court may award counsel fees to a successful party when his opponent has acted "in bad faith, vexatiously, wantonly or for oppressive reasons," which bad faith "may be found in actions that led to the lawsuit," 412 U.S. at 5, 15, the District Court held that Respondent was alternatively entitled to an award of attorney fees on this ground. (A-402)

The Court of Appeals, bound by its earlier decision in Shimman v. International Union of Operating Engineers, Local 18, 744 F2d 1226 (6th Cir. 1984) (en banc), cert. denied 105 S.Ct. 1191 (1985) declined to affirm the award on this basis. (A-486-487). In Shimman the Sixth Circuit had held that "bad faith" in the acts giving rise to the substantive claim, could not form the predicate for a fee award.

With respect, the Sixth Circuit's position on the matter is contrary to this Court's view of the matter in Hall and to subsequent decisions of other Circuit and District Courts; e.g., Richardson v. Communication Workers, 530 F2d 126 (8th Cir), cert. denied, 429 U.S. 824 (1976); Fairley v. Patterson, 493 F2d 598 (5th Cir. 1974); McQuiston v. Marsh, 707 F2d 1082 (9th Cir. 1983); Bise v.

International Brotherhood of Electrical Workers, 618 F2d 1299 (9th Cir. 1979).

There is no good reason why Petitioners, having forced Murphy to go to court to correct the deliberate and malicious violations of his LMRDA rights, should not be obliged to pay for the proceeding.

Moreover, Respondent prevailed on his pendant state law claims of assault and battery and conspiracy (A-275-A276, A-290). As the Sixth Circuit noted in Shimman:

> "Ohio law allows attorney fees to successful plaintiffs in assault and battery cases, or in any case in which punitive damages are allowable. E.g., . . . Columbus Finance, Inc. v. Howard, 42 Ohio St.2d 178, 327 NE2d 328 (1975)...." 744 F2d at 1237.

Accordingly, the instant award of attorney fees is further independently supported on state law grounds.

CONCLUSION

Respondent respectfully submits that the instant Petition for the issuance of a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on September 30, 1985 ought to be denied because the judgment is consistent with prior and controlling decisions of this Court and with the decisions of other Circuits on the same questions, raises no issue similar to that raised by a case pending before this Court, and presents no issues of general importance to the public but rather turns upon an analysis of the facts peculiar to the proceeding.

Respectfully submitted,

ALAN MILES RUBEN, Counsel of Record
c/o Cleveland-Marshall College of Law
Cleveland State University
Cleveland, Ohio 44115
(216) 687-2310
Counsel for Respondent

Supreme Court, U.S.
FILED
FEB 11 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1107

In the Supreme Court of the United States

October Term, 1985

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 18, *et al.*,
Petitioners,

vs.

WILLIAM F. MURPHY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF OF PETITIONERS

WILLIAM FADEL, *Counsel of Record*
FRANCES M. GOTE', *On Brief*
WULIGER, FADEL & BEYER
1340 Sumner Court
The Brownell Building
Cleveland, Ohio 44115
(216) 781-7777
Counsel for Petitioners

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

TABLE OF CONTENTS

ARGUMENT 1

I. THE PETITIONERS ARE NOT BARRED FROM HAVING THIS COURT CONSIDER THE PROPER LEGAL STANDARD TO BE APPLIED IN CALCULATING FEES UNDER THE COMMON BENEFIT RATIONALE, EVEN WHERE THE ATTORNEY FEE AWARD WAS BASED SOLELY UPON AFFIDAVITS AND BRIEFS SUBMITTED BY COUNSEL 1

II. THE RESPONDENT INCORRECTLY ASSERTED THAT PETITIONERS SEEK REVERSAL OF THIS COURT'S HALL v. COLE DECISION AND THAT THE COMMON BENEFIT FEE DETERMINATION WAS NOT ARGUED ON APPEAL, WHILE OMITTING AN EXPLANATION FOR HIS STATEMENTS TO THE SIXTH CIRCUIT THAT RESPONDENT WOULD HAVE TO APPLY HIS $10,000 IN COMPENSATORY DAMAGES TO PAY HIS ATTORNEY FEES 3

III. BY RESPONDENT'S OWN DESCRIPTION DURING THE APPELLATE PROCEEDINGS ANY COMMON BENEFIT FEE AWARD WAS UNWARRANTED AND THE METHOD OF CALCULATING THE FEES WAS INCORRECT 4

CONCLUSION 7

TABLE OF AUTHORITIES

Cases

Blum v. Stenson, 104 S. Ct. ....., 79 L. Ed. 2d 891 (1984) 1
Cole v. Hall, 462 F.2d 777 (2d Cir. 1972) 3, 4
Riverside v. Rivera, 763 F.2d 1580 (9th Cir. 1985), *cert. granted*, No. 85-224 ..... 1, 2

Statutes

42 U.S.C. § 1988 2

Upon a review of the Respondent's Brief in Opposition, it is apparent to petitioners that clarification of the respondent's interpretation of the facts and relevant issues in the instant case is necessary.

ARGUMENT

I. THE PETITIONERS ARE NOT BARRED FROM HAVING THIS COURT CONSIDER THE PROPER LEGAL STANDARD TO BE APPLIED IN CALCULATING FEES UNDER THE COMMON BENEFIT RATIONALE, EVEN WHERE THE ATTORNEY FEE AWARD WAS BASED SOLELY UPON AFFIDAVITS AND BRIEFS SUBMITTED BY COUNSEL

The respondent argues at pages 34-39 of Respondent's Brief in Opposition, citing *Blum v. Stenson,* 104 S. Ct. ....., 79 L. Ed. 2d 891 (1984), that the petitioners are barred from contesting the calculation of the amount of attorney fees because prior to receiving the affidavits of attorneys submitted by respondent, regarding prevailing hourly rates, they agreed to have the court calculate the amount of attorney fees, according to the respondent, because the petitioners failed to identify any bases for reducing the number of hours or hourly rate. The scenario presented by the respondent is nearly identical to that which transpired in *City of Riverside v. Rivera,* 763 F.2d 1580 (9th Cir. 1985), *cert. granted,* No. 85-224.

According to the Petition for Writ of Certiorari in the *Rivera* case, the district court in that case awarded attorney fees although there was no evidence submitted be-

yond attorney's affidavits and the arguments submitted by the parties in their briefs on the attorney fee issue. Also in *Rivera,* the plaintiff's motion for attorney fees failed to indicate whether the hours submitted were taken from contemporaneously kept time records, nor did the time records separate out pre-litigation time, litigation time, travel time, or other duplicative time. Nonetheless, the district court in *Rivera* determined the amount of fees and refused to reduce the amount of the award to reflect the arguments made by the defendant regarding the application of the *Johnson* factors. The Ninth Circuit Court of Appeals affirmed the decision.

This Court has granted certiorari in *Rivera* to consider the proper standards within which a district court may exercise its discretion in awarding attorney fees under 42 U.S.C. § 1988. The petitioners in the instant case pose the same question as applied to the common benefit exception to the rule on attorney fees, as opposed to the statutory exceptions. As in *Rivera,* the fact that the attorney fees calculation was based on no more evidence than affidavits and briefs submitted to the court, does not bar the review of the proper legal standard to be utilized in calculating the amount of attorney fees. Also as in the *Rivera* case, the petitioners in the present case submitted briefs to the district court which thoroughly analyzed the standards to be applied in calculating the fees and the excessiveness of the fee award. Thus, in the instant case, the petitioners should not be barred from submitting for this Court's determination, the questions presented in the Petition for Writ of Certiorari regarding the proper standards to be applied by the district court in calculating attorney fees under the common benefit rationale.

II. THE RESPONDENT INCORRECTLY ASSERTED THAT PETITIONERS SEEK REVERSAL OF THIS COURT'S HALL v. COLE DECISION AND THAT THE COMMON BENEFIT FEE DETERMINATION WAS NOT ARGUED ON APPEAL, WHILE OMITTING AN EXPLANATION FOR HIS STATEMENTS TO THE SIXTH CIRCUIT THAT RESPONDENT WOULD HAVE TO APPLY HIS $10,000 IN COMPENSATORY DAMAGES TO PAY HIS ATTORNEY FEES

The Respondent's Brief in Opposition includes a description of the power of attorney arrangement between Murphy and his counsel, and argues that the petitioners cannot now assert that the award and calculation of the common benefit attorney fees was erroneous based on the absence of an obligation to pay any fees to his attorneys.[1] In so doing, the respondent fails to address his statements to all involved at the appellate level that Murphy would have to pay his attorney fees out of his $10,000 in compensatory damages.

The appellate argument contradicts the respondent's assertion to this Court that the existence of a fee obligation is not an essential precondition to a common benefit fee award.[2] Furthermore, the petitioners did appeal to the Sixth Circuit the award of fees under the common benefit rationale, as well as the improper calculation of the fee award. The power of attorney discussed herein was attached to affidavits which were before the appellate court.

---

1. Respondent's Brief in Opposition, pp. 51-56.

2. Respondent's Brief in Opposition, p. 56. Respondent offers no case law to support such a conclusion, which directly conflicts with the common benefit cases cited in petitioners' brief.

Respondent cites *Cole v. Hall,* 462 F.2d 777 (2d Cir. 1972), at pages 55 and 56 of Respondent's Brief in Opposition, to support his theory that even absent a fee obligation to plaintiff's counsel, a common benefit fee award is justified. Such a citation is unpersuasive as applied to the present case because in that case the parties stipulated to the amount of the fees. The court further stated that it need not address the issue as to whether there could be a fee award if the services were gratis, because both the plaintiff and his counsel bore the costs of the litigation. Clearly the present case is distinct and petitioners in no way seek a reversal of the *Hall* decision.

III. BY RESPONDENT'S OWN DESCRIPTION DURING THE APPELLATE PROCEEDINGS ANY COMMON BENEFIT FEE AWARD WAS UNWARRANTED AND THE METHOD OF CALCULATING THE FEES WAS INCORRECT

At page 42 of the Respondent's Brief in Opposition, the respondent correctly asserts:

> The reasonableness of the attorney fees awarded is not to be judged by the personal relief Murphy achieved. It is rather to be viewed in light of the substantiality of the benefit conferred upon all the members of the Union.

Respondent then describes on page 44, how Murphy "did much more" for the Union members than merely advancing their rights through the vindication of his Section 411 rights, when he exchanged his $150,000 punitive damage award against the Union for the introduction of "a series of democratic reforms in the governance and administrative processes of the Union." Regarding the reforms he pur-

portedly introduced, respondent further states at page 45 of the brief to this Court, "For the first time, candidates for union office are entitled to speak to the membership on behalf of their candidacies." The respondent then includes a description of laudable changes in the referral system, all in an attempt to establish the substantial reforms he initiated in exchange for his punitive damage award. The thrust of the respondent's position is that because his litigation resulted in such substantial and necessary reform for the Union members, he is entitled to attorney fees under the common benefit rationale and the computation of such fees was properly determined.

However, during the proceedings in the Sixth Circuit Court of Appeals in the present case the respondent repeatedly denounced the effectiveness of the reform plan. One headnote in Murphy's Brief of Plaintiff-Appellee/ Cross-Appellant included the following description of the same hiring hall plan:

> . . . The Court Below Erred, However, In Accepting a Plan Which did no More Than Allow Candidates to Speak for Five (5) Minutes at Pre-Election Meetings and Required the Printing in the Union's House Organ of the Text of Title I of the Labor Management Reporting and Disclosure Act of 1959 and Notices of the Availability of the Union's By-Laws and Constitution and Certain Federal Labor Publications, in Satisfaction of its "Democratization" Conditions and Thereafter Vacating the Punitive Damage Award.

The plaintiff-appellee below criticized the reform plan proposed by the Union, describing various aspects of the reform plan as offering no more to the Union members than the reprinting of "the Declaration of Independence

and the lyrics of 'Yankee Doodle' ";[3] as "scarcely qualif[ying] as a 'reform' ";[4] as "not realistically respond[ing] to the expressed concerns of the Court. It does not reach and resolve the problems giving rise to the present litigation";[5] as not "meaningfully promoting the cause of Union democracy";[6] and as serving "no useful purpose whatsoever."[7] The plaintiff-appellee below also referred to the lower court's decision as follows: "By any fair analysis of the impact of the Defendants' Plan upon the desired goal of democratizing the channels of communication with Local 18, it is clear that the Court below erred in holding that the Defendants' Plan entitled them to the grant of such relief."[8]

It seems that while the respondent still thought that he was entitled to a statutory fee award, or possibly a bad faith award, he regarded the benefit to the membership arising from his litigation to be minimal. Before this Court, however, he touts his reforms on behalf of the Union membership in exchange for his punitive damage award, arguing that the award was justified and that there was no reason to reduce the amount of the award. For the reasons asserted in the Petition for Writ of Certiorari, the fee award under the common benefit exception to the American Rule and the method used to calculate such fee award should be reviewed by this Court.

---

3. Brief of Plaintiff-Appellee/Cross-Appellant, p. 47.
4. Brief of Plaintiff-Appellee/Cross-Appellant, p. 47.
5. Brief of Plaintiff-Appellee/Cross-Appellant, p. 48.
6. Brief of Plaintiff-Appellee/Cross-Appellant, p. 48.
7. Brief of Plaintiff-Appellee/Cross-Appellant, p. 49.
8. Brief of Plaintiff-Appellee/Cross-Appellant, p. 50.

CONCLUSION

The petitioners urge this Court to grant their Petition for Writ of Certiorari, in order to eliminate the conflicts and confusion created by the Sixth Circuit's fees decision based on the common benefit rationale.

Respectfully submitted,

WILLIAM FADEL, *Counsel of Record*
FRANCES M. GOTE', *On Brief*
WULIGER, FADEL & BEYER
1340 Sumner Court
The Brownell Building
Cleveland, Ohio 44115
(216) 781-7777
Counsel for Petitioners